

United States District Court  
Southern District of Ohio  
Columbus Division  
Case No: 19-CR-174

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United States of America,  
Plaintiff

vs

Michael Sutherin,  
Defendant

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**Sentencing Memorandum: Michael Sutherin**

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Dated: October 20, 2020

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## Introduction

This memorandum is given to help the Court in sentencing defendant Michael Sutherin. Michael has pleaded guilty to two counts of enticement of a minor (18 U.S.C. § 2422(b)) and two counts of receipt of child pornography (18 U.S.C. § 2252(a)(2)). The plea agreement was entered pursuant to Rule 11(c)(1)(C) of the Rules of Criminal Procedure. If this Court accepts the plea, the agreed-upon sentence will be 180 months of imprisonment. Thus, one purpose of this memorandum is to assure the Court that a sentence in excess of 180 months would be inappropriate and “greater than necessary” to achieve any legitimate purpose of sentencing. Michael’s friends and family have provided letters of support and are attached as **Exhibit A**.

Michael suffers from Autism Spectrum Disorder (“ASD”), a pervasive developmental disorder. ASD is a neurological condition which severely impairs the social learning skills by which affected persons, beginning at birth, perceive the nonverbal social cues that convey the actual meaning of social interactions. From thousands of interactions beginning at an early age, most people learn the largely unwritten rules of social communication and interaction (i.e. “common sense”) that underlie social norms. Without these social learning skills, despite average intelligence and other abilities, those with ASD can be completely clueless about social and legal taboos, especially regarding the internet. Individuals with ASD will look at sexual images of children with no understanding of crossing any boundaries, no understanding of how such images came about, no sense of their social implications, and no interest in actually engaging in the conduct they see. Those without this impairment can understand the wrong in sexualizing small children, but those with ASD are often oblivious to these taboos.

In the rare cases where this issue has been timely and thoroughly raised, such presentations have often made a difference to the prosecutors and judges involved. Counsel has gathered data on approximately 54 defendants with ASD who were charged in connection with child pornography or similar offenses. Information and expert reports relating to ASD have been presented in these cases to various degrees.<sup>1</sup>

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<sup>1</sup>While autism seems to be on the rise in the U.S., with somewhere near 1:59 children having a form of the condition (CDC 2018), there is not an “epidemic” of these children getting involved in the criminal justice system. In other words, there is no “floodgates” issue in complying with disabilities law and policy pointing to diversion of the developmentally disabled from the criminal justice process. While there are very substantial problems with inappropriate sexual behavior on the

Among these cases, there were nine cases in which prosecution was declined or discontinued by state and federal prosecutors – a few overtly on grounds of lack of competence. There were at least nine state and federal cases in which a criminal case was brought but later resolved with a plea to an offense related to dealing with obscene material, e.g. 18 U.S.C. §1462 (Transportation of Obscene Materials), or misdemeanors related to obscenity, none of which are “registerable” “sex offenses.” In federal cases, excluding pretrial diversion and non-prosecution agreements, the average downward departure from the sentencing guideline’s recommendation is 83%. In 78% of all state and federal cases, the defendant saw no additional jail time. (Chart Attached as **Exhibit B**). ***None of these defendants have reoffended.*** Only a handful of these other cases had the role of autism in the offense, and the particular deficits of the accused as a result of his autism, have not been explored as thoroughly as here.

In Michael’s case, the defense sought to persuade the government of the extraordinary implications of Michael’s particular form of autism. Michael’s autism explains how he could be involved with child pornography without a sexual interest in children, or the same level of mental or moral culpability we attribute to the typical offender. It also explains why he does not present the future risks commonly associated with this behavior.

The reason for providing the Court with this information is to ensure that the Court has everything it needs to craft a sentence which addresses all of the relevant sentencing factors under 18 U.S.C. § 3553(a), but which also protects Michael from victimization while he is in custody, and that the conditions of supervision are appropriate to his condition.

## **Michael Sutherin**

Michael’s childhood developmental history is a textbook display of traits and behaviors typical of those with autism spectrum disorder. The deficits he displayed reflected substantial difficulty with social learning and adaptation.

### **A. Early life**

Michael Thomas Sutherin was born via c-section on December 9th, 1997 at Ohio State University Hospital in Columbus, Ohio. Michael was the first baby in a set of triplets born to his parents, Tom and Ann Sutherin. His sister Brittney was second and his sister Barbara came third.

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part of those with autism, viewing child pornography seems to be limited to the relative few with the most severe interpersonal social skills.

The babies were seven and a half weeks premature. Michael also has two older sisters, Christine and Elizabeth. He also had an older brother, Vincent, who died shortly after birth.

### **Early signs of autism-related sensory problems**

As a baby, Michael was easily over-stimulated and would shut down. He would seem to fall asleep. Michael was often over-stimulated when being fed solid foods, and would shut down multiple times during feeding. Michael struggled to make eye contact as a baby. Brittney and Barbara easily made eye contact more than Michael. Michael also didn't like loud noises. If a show on the television had a thrilling part or too much noise, Michael would become upset and cry inconsolably from just hearing the sounds. Michael's father would rock Michael and hold his hands together to calm him to stop his crying and look at him to try to get him to make eye contact.

### **Apparent developmental delays**

Michael and his sisters were developmentally tested at Children's when they were three. Michael was unable to walk down stairs by putting his foot down to the next step on the stairs at the clinic. Michael would not drop or let go of a toy. Michael would not stack toy blocks. Michael's sisters would often accomplish developmental milestones first.

Michael's parents taught him and his sisters baby hand signals to ask for more food or drink or to go to the bathroom. Michael would sign for drink, more food, and potty. Michael would point at things or try to show his parents what he wanted. Michael's sisters were not speech delayed and helped Michael to be understood. Michael understood what was said to him. Michael played well with his sisters and they shared their toys.

Michael had a very small vocabulary when he started pre-K plus he didn't pronounce some sounds correctly, so his speech was very hard to understand. His sisters had to help him develop these skills. But there were some setbacks. Michael's mother planned to start potty training on one of his sisters first. Michael wanted to be potty trained at the same time. Once Michael saw his sister's poop in the potty. Michael picked it up and took it to his mother, proudly showing it to his mother.

Michael started speech therapy at 2 years of age to help with his speech delay. October 1999, nearly two years of age, Michael could only say "ma ma," "da da," "duck," and "dog." Even by the time he had turned 3, Michael had a limited vocabulary and could not put together a 3-word sentence. Michael received itinerant help from Worthington schools in speech and OT until he reached the first grade.

Michael learned to turn lights on and off and to open doors. Michael would turn on every

light he could. Michael would open cabinets and doors wherever he found them. Michael never took anything out of the cupboards but loved the motion of the door.

#### **Relative immaturity; sensitivity to specific textures**

Michael sucked his right thumb and had a blanket he liked to chew on. Eventually he chewed on the blanket so much that it disintegrated. After the blanket was nothing more than threads, he would move on to undershirts to chew on. He sucked his right thumb up until at least 2017. He chewed on a blanket or t-shirts until winter of 2018.

Michael would not try on new clothes if they had any tags on them. Michael did not like to change from long sleeves to short sleeves or pants to shorts. Michael's mother had to remove the off season clothes from his closet in order to get him to wear the proper clothes for the weather. Michael would not walk on the grass in bare feet. Michael's mother had to cut the labels off of his clothes. Michael did not like anything scratchy.

### **B. Preschool through Kindergarten**

In the fall of 2001 at the age of 3, Michael and his sisters started preschool at Our Lady of Bethlehem (OLB) in Columbus, Ohio. The many parties at school were a challenge for Michael. Michael liked a routine but party days were not routine: the room would fill with parents, the kids would have a craft to do, and there was always food and candy. The room became crowded and noisy. As he had done as a baby, Michael would shut down.

When he was younger, Michael's diet was strictly vegetarian and he had very few sweets. When his parents let him eat sweets, however, his taste for them expanded greatly. He tasted everything but he rarely ate much of any of it. At a party, he would taste the icing on a cupcake but not eat it. He would taste several lollipops and leave them.

In 2002, shortly after Michael entered pre-kindergarten (age 4), he and his family attended St. Michael's church festival in Worthington. Michael came walking towards his mother while holding his right arm up. Michael's mother noticed that Michael's arm had a curve in it. An x-ray at the hospital showed that Michael's right arm was broken. Michael never cried and seemed to be unaware of the injury. Eight weeks later, when his cast was removed, the nurse assured him that the vibrating saw would not hurt him. Michael calmly and coolly told the nurse that the saw was cutting him. The nurse said it was not, but when she drew away the saw, it had indeed cut him, causing him to bleed. Michael never panicked or reacted with alarm. As he was walking out the door from getting his cast off, Michael started to suck his thumb again.

It was during these years that Michael's diet became very limited. Michael ate soft foods like pasta, pancakes, waffles, bananas, pbj, veggie burgers, string cheese, muffins, pizza, tortilla chips, and tons of chocolate milk. As time went on it had to be Kroger's chocolate milk. Michael stopped eating green beans, corn, and other vegetables. If Michael's mother asked him to try a food, Michael would put it in his mouth and taste it. Michael would chew the food but not swallow it and would eventually ask permission to spit it out. Michael smells the food to decide if he will eat it. Michael never wanted any French fries or sodas.

### **C. Elementary School**

When Michael was 6 years old in 2004, a family friend and occupational therapist told his parents that Michael appeared to have a sensory disorder. Testing through Children's later confirmed this. Michael's parents took a multi-week course on how to help Michael overcome this issue.

Michael had an IEP from Worthington Schools which included speech and music therapy. Michael suffered from poor hand-eye coordination, slow motor skills in writing, and generally required more time and effort to accomplish tasks compared to his peers. While his intellectual abilities did not lag, he seemed slower and more inhibited than others his age, including his sisters. There were a couple of times Michael had trouble on the playground keeping up with boys from the second grade class. Michael was not athletic. Michael was not good at throwing a ball or running. Michael would also quickly over heat if he had to run and he would get red faced and sweaty.

Michael went through a period where he would repeat what his sisters had just said. It usually caused a fight among the three. Michael would also put the close captioning on the television, which was not welcomed by all viewers. Watching movies on the TV, Michael would have certain scenes that he would replay and replay, and replay also making everyone angry. For some movies, Michael knew many of the lines word for word.

After attending OLB, Michael went to Worthington Bluffsview Elementary for 4-6 grades in Worthington, Ohio.

The summer after 4th grade, some classmates of Michael's told him about computer pornography and where to find it. Michael did start to search the computer for porn. Michael's parents changed the computer password. At times, the parents took the power cords so Michael could not use the computer.

### **Early autism testing–missed diagnoses**

Sometime around fifth or sixth grade, Michael was tested for autism at Children's Close in Westerville, Ohio. The findings were at the time that Michael was not autistic. It is not clear what tests were administered or whether the person administering them was qualified. However, it was recognized at that time that Michael had significant problems with sensory integration, speech delay, annunciation problems, lack of motor skills, obsession with collecting things, repeating movie scenes and dialogue, and lack of attentiveness.

The lunch room and the playground were very hostile areas for Michael. In the lunch room the students would get up and leave the table to avoid eating with Michael, he often ate alone. On the playground no one played with him. Michael was not good at throwing or catching balls. One day, on the playground, a group of classmates formed a circle around Michael. They started to hit him with a ball. Michael felt if he was strong enough that they would not hurt him and then they would become his friend. He didn't realize that they were making fun of him, he just enjoyed the attention he was receiving.

Just before 6th grade ended, Michael's parents had Michael tested at Nationwide Children's Close to Home Behavioral Health in Dublin, Ohio for ADHD. Michael was diagnosed with ADHD.

### **D. Middle School**

Michael and his sisters were accepted via lottery system into Phoenix Middle School in Worthington, Ohio. Phoenix Middle School is a school centered around alternative and experiential learning. The Phoenix system of teaching was challenging for Michael. He often had to re-submit homework as often as necessary to get it right. Michael often did the assigned homework but failed to turn it in. If it was turned in late and was wrong or incomplete, he would have to correct it and turn it in again. Consequently, Michael was rarely up to date on his assignments.

Michael was, and still is, fidgety. Michael sometimes struggled to sit or maintain his attention during these classes. Michael would excuse himself to the restroom when he needed a break. However, these breaks often got stretched a bit longer than most students would take and Michael would get distracted by someone in the hall or an idea of something that needed done. The teachers sometimes had trouble keeping track of him.

Michael chewed on his t-shirts in his sleep until they were not fit to even be rags. He rarely wore them but he would stick a wad of a T-shirt in his mouth and gnaw on it throughout the night.

He did the same thing with his bed sheets and blankets. Michael's mother separated the sheets that Michael had chew holes in so they would be used only by Michael. Michael would request flannel sheets year around. Michael would roll up in a fleece blanket and turn his ceiling fan on full speed. He started this behavior around sophomore year of high school. This helped him block out sounds and created pleasing sensations for his body. Michael has two fleece blankets that he likes to put over his shoulders while he's in his room. This blanket chewing and the high speed ceiling fan has continued into his adult life. Michael would chew on the computer mouse cords, pencils and any rubber pencil grips.

During middle school, Michael was back on an IEP and had an aid with him in the classroom. This embarrassed him and caused more teasing and bullying. There was one incident with another student that particularly bothered him. This other student had ADHD and worked with the same intervention specialist. This student felt Michael was being too loud or too bothersome during a time when he was in the intervention specialist's office. This student caused a whole scene, yelling and screaming that Michael was physically hurting him. Even though Michael didn't touch him, this student managed to get Michael in trouble with the school. One day, after gym class, Michael was in the boy's locker room. Two other boys were in the locker room. One of the boys grabbed Michael's arm and punched him in the stomach and the other boy punched Michael on the back. The gym teacher was in the gym and heard the noise but did not check it out. Michael did not want to go back to school and stayed home for a few days. The gym teacher had to convince him to come back to school.

Michael had two friends during his middle school years. They were also nerdy, socially under-developed, and were also bullied. These three tended to hang out together playing card games and Nintendo, and eating lunch together.

### **First autism diagnosis: 2012**

August 2012, at 14 yrs. old, Michael was tested by Dr. Steven Guy in Worthington, Ohio. The results were that Michael was on the autism spectrum, and had Asperger's Syndrome. Unfortunately, lacking guidance from school professionals, his family did not appreciate the serious need which he, like other young men with this condition, had for socialization and sexuality training needed to make up for his social learning difficulties.

## **E. High School**

After learning of Michael's autism, his parents felt that he would do better at Haugland, a school in Columbus designed for autistic children. Changing schools yet again was difficult for Michael; he needs routine, consistency, and familiarity. He had to deal with new teachers in new locations among all new students. Eventually, however, Michael started to flourish. Michael was part of the bowling team. The teachers encouraged students to read and to strive for college. Michael learned that, in spite of his struggles, there were other students with problems and issues worse than his.

In July, 2013, Michael's older sister Elizabeth, her husband John, and their three young children moved in with Michael and his parents. Michael and his triplet sisters were 15 years old at this time. John had just been discharged from the army. He had a temper and PTSD from three deployments to Iraq. He was menacing and often verbally and physically abusive of his children and the triplets, including Michael. Once, John grabbed Michael and twisted Michael's arm behind him for not following his instructions. Michael was terrified of him. Eventually, John was kicked out of the house for seriously injuring his daughter.

After the traumatic experience with John, Michael seemed to recover. 10th grade was a good academic year for Michael. Michael's grades and bowling were going great. Michael had a girlfriend. Lizzie was on the Haugland bowling team and her dad knew Michael's dad. Lizzie also had ASD. She was nerdy. It was a fairly platonic relationship. She liked Michael and Michael enjoyed her company. She even went to the Parade of Homes with Michael and his family. Lizzie came over to Michael's house and Michael went to her house.

By the late summer of 2014, Michael was 16. Haugland changed their teaching program and some of the teachers that had really helped Michael decided they needed to leave. Michael's parents called Worthington Schools and told them Michael was coming back to the Worthington schools.

Back at Worthington, Michael had trouble adjusting. Michael wanted to fit in but being a vegetarian was strange to the other students. To show them that he was "normal," Michael started to eat 2 to 3 hamburgers a day. This, coupled with his unchecked love of sweets, caused Michael to gain weight. This isolated him even more.

One day, Michael developed a lot of foot pain. Michael's doctor found that Michael had broken small bones on the ball of his foot. This was due to the heavy, stomping way that Michael

walks. Michael always lands hard on his heels when he walks. Michael also had knee pain which the doctor told him he would probably outgrow. Michael also started developing intestinal issues, perhaps from his poor diet, which have since continued.

Michael does not do well with instructions that are general or multi-level instructions. Michael could not be told to clean his room. Michael's parents would have to break up the request into small pieces. For example, they would ask him to pick the clothes up off the floor; when that was done, they had to ask him to then put clothes in the drawers. Michael would mow the grass. Michael would mow some grass then turn off the mower and wander off to do something else. Later, Michael would start the mower and mow some more, then stop again when he grew bored.

## **Early Adulthood**

Worthington Schools and Columbus State Community College (CSCC) have a joint transition program for autistic students. Michael's first year at CSCC was 2016, it included a counselor that met with Michael and checked on his progress weekly. Michael still had trouble turning in his homework, organizing his homework, and scheduling his time. Michael's parents drove him to class, as he could not drive and has never been able to learn how. Michael tried different bus route to get home. Michael would call home and tell his parents where to pick him up from the bus route he used that day. Michael was uncomfortable on the bus. He did not like strangers talking to him or asking him questions.

While at CSCC, the program Michael was a part of encouraged the students to get a job. On his own, Michael got a job at Meijer's store gathering up the shopping carts. Michael still had to be driven to work. He quit when it grew cold outside.

All through his school years and still today, Michael has had an obsessive interest in playing video games. Playing with others online was his way of socializing without the need to be socially correct or awkward in-person. Michael would spend hours in his room playing various video games. When he went to Columbus State, one of the first places he found was their gaming room where students could relax and take a break playing video games. Whether he plays with someone or just by himself, Michael's video games provide a wide variety of fantasy worlds that he can easily escape to. If he had a bad day, he could play a game and relieve his frustrations. It would be both a release and an escape for him from the real world. For many kids, video games are games of skill requiring focus and eye hand coordination and like any action movie they provide a little escape from reality.

For someone who struggles socially, it's not too hard to see why they would spend hours upon hours playing in a world in which they're comfortable.

After he turned 19, Michael got his next job at Sam's Club by working with a group called Functional Training Services. Michael was terminated after 90 days. Sam's Club was afraid of Michael's safety. Once, Michael walked in front of a moving car in the parking lot; another time, he lowered a pallet on his foot; and once, he operated a floor cleaner without the proper training. Sam's Club fired him but told him to come back and apply again after 3 months.

December 2018, Michael got another job working in the hot food bar of a Giant Eagle grocery store on his own in December 2018, but couldn't start until January due to the flu. He was not attending CSCC. Michael liked the job and was starting to show some initiative. The work area was small and quiet. The boss liked Michael and Michael was doing a good job but he has been unable to work since his arrest. Michael is sorry he had to leave the job. Michael hopes when this is resolved that he can have his job back.

Michael lived at home while going to college and was trying to help more around the house. Michael stopped chewing on a flannel blanket that was full of holes and half gone. Michael gave his mother permission to throw the blanket out. But, at 2 am, Michael went out to the curb and dug the blanket out of the trash bin before morning pickup. A few weeks later, Michael finally did throw out the blanket.

Michael still struggles to understand others. One can tell Michael things in very minute detail. Michael will say he understands. Later, Michael will ask questions about what he had just been told. This can go on for days. Then, sometime later, Michael will still ask questions about the discussion showing that he really has not grasped the concept. When watching a movie or TV show, he often asks what the plot is or what's going on. A common phrase of his is 'In English please?' He often pulls up the TV guide synopsis or he'll turn on closed captioning to better follow what's being said. When possible, he would rewind and replay many segments of a show or movie to either better understand it or because he thought a particular scene was funny. Simple jokes are often elusive to him and need to be explained. He will often laugh at funny scenes along with everyone but later ask what was so funny.

Michael is pre-diabetic. Michael does not want to discuss it at all. This issue remains unaddressed, even as Michael has been incarcerated. Michael finally learned to tie his shoes in high school. Michael will turn on every light as he goes through the house. Michael does not turn off the

lights. If Michael has been up during the night, it is easy to tell where he has been. Michael has always been very sensitive about his clothes. If they got dirty or wet in any way, he would insist on changing them, even if that meant going home to get clean dry clothes. Once, he got his work shoes dirty from cleaning up a mess at Sam's Club. His first thought was to burn the shoes.

Michael has trouble recognizing social cues. He would often walk up to a group and try to get in the conversation without listening to what was being said which would interrupt the existing group conversation. He would tend to mention something that was on his mind. Sometimes he would start or engage in a conversation and then continue to talk to the exclusion of the other people. He might jump from one topic to another unrelated topic to another unrelated topic. He would turn the conversation to a topic he is familiar with. When Michael gets nervous he will talk and talk.

Michael is often very detail-oriented. When traveling, he would find the schedule boards, gates, restrooms, and directions to necessary places. He is not shy about asking for help or directions. For a time, he needed to ride the bus to Columbus State Community College. It didn't take him long to figure out the various bus routes and bus stops. He knew how to get to the Easton shopping center or the Polaris mall from CSCC by bus. He seems to learn and retain things that he sees or figures out for himself rather than things that are told to him. Although he takes in details, he is not skilled in deductive reasoning or the ability to think things through to a logical conclusion or to logical consequences.

When Michael has money to buy food at a counter he always orders more than he can afford. He was on a school trip and bought a hoodie for more money than he had. A teacher had to loan him money to buy his hoodie. Once in Germany on a school trip, Michael bought a lot of souvenirs early in the trip. Michael ran out of money to pay for his lunches for the rest of the trip. Michael proving to others that he could eat meat even though being a vegetarian bought a bratwurst. Michael took one bite of the sandwich, hated it and threw the brat out and did not have any more money to buy more food that day. Michael bought M&M's to eat and would not have enough money to buy lunch.

Michael took the bus home from Columbus State Community College most days. Michael would try different routes. Michael did not always get a bus that would bring him close to home. He would get off the bus and call home to get picked up. Many times Michael would get impatient waiting on his bus and would get on the next bus hoping it would get him close to home. One time on the bus a man approached Michael and asked him if he wanted to have sex. Michael left at the next stop and called home to be picked up.

Michael did not like elevators. Whenever possible Michael would take the stairs. Once, in the main library at OSU, Michael said he would take the stairs. His parents warned him that he needed stairs for the tower and that it would be easier to ride the elevator. Michael never made it to the top. They found Michael waiting where they had left him. Michael said he tried many different ways to get up to the top but could not.

When Michael or anyone would get hurt or sick, Michael would become irrationally upset and ask to go to the hospital or emergency room immediately. But, whenever he did go to see a doctor, Michael was difficult. He refused to let the doctors swab his throat to check for strep. Whenever given medicine, once Michael felt better, he would stop taking the medicine even if the doctor had stressed he must finish the medicine.

Michael would often forget to come down to eat supper. He would come down hours later and have a head ache or stomach upset but couldn't understand why.

Michael does not understand how money works. He will buy a gift card with a credit card belonging to his parents. Then he will use the gift card to buy something frivolous, like a computer game. When his parents would tell him that he should not have spent money on whatever he had bought, Michael's response was often that he did not "spend money" on it but used a gift card. Michael did not understand that the gift card was worth actual money. Nor does he understand that things charged to a credit card must eventually be paid for. Michael was able to get a savings account after high school graduation. Eventually, Michael spent all of the money and owed money for fees, which he could not understand, no matter how much his parents explained it to him. Michael closed the account. Later, when Michael got a part time job at Giant Eagle, he opened a new account at the bank located inside the store. He once again spent more money than he had, without realizing that he actually had to put more money into the accounts in order to spend it. He had to close this account again after owing considerable overdraft fees.

## **Psychological Evaluation: A.J. McConnell**

A.J. McConnell is a clinical psychologist who specializes in the diagnosis and treatment of ASD. His report is attached as **Exhibit C**.

## Sexual Interest Assessment

In any child pornography or solicitation case, there is always concern that those who view child pornography are predatory pedophiles who will (if they have not already) commit a physical offense against a child. Considering whether a defendant has an actual interest in sexual contact with children is very important in deciding the extent to which they pose a future risk of harm to others.

For this reason we asked Dr. Frederick Peterson, a licensed psychologist, to conduct a sexual interest assessment of Michael. Dr. Peterson's report is attached as **Exhibit D**. His principal findings are based on the results of the Abel Assessment for Sexual Interest ("AASI-2").

The AASI is an objective measure of sexual interest based on viewing images of individuals in 22 categories based on age, sex, and race.<sup>2</sup> The subjects viewing the images are told to subjectively rate the individuals in the images according to how desirable or undesirable they would view sex with that person. However, unknown to the subject, critical information is gathered during this phase about the time spent on viewing each image. Different algorithms are used to calculate the average length of time spent on any given image and deviations from that mean. The AASI has been validated against penile plethysmography ("PPG"), which uses a device that measures arousal by detecting blood flow to the genitals. While PPG is considered the "gold standard" in past research, it can be inconvenient to administer as it is intrusive, time consuming, and requires special conditions to perform. The AASI, which is not scored by the operator, can rule out a sexual interest in prepubertal children.

According to Dr. Peterson, Michael's assessment results show that he experiences normal sexual interest in post-pubertal underage girls, some interest towards adult men, and no sexual interest to prepubescent females. These results were "typical" according to Dr. Peterson. Sexual attraction to postpubertal individuals is recognized as normal among adults, including those with ASD. Dr. Peterson concludes, based on the entirety of the results, that Michael has no interest in sexual activity with underage children. He has no inherent or organic attraction to children, nor does he have any of the other risk indicators that would suggest pedophilia.

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<sup>2</sup>The only races depicted are Caucasian and African-American.

## **Autism Spectrum Disorder (“ASD”)**

When referring to ASD, we refer to individuals who would previously have been diagnosed with Asperger’s Syndrome (“AS”) or perhaps Pervasive Developmental Disorder-Not Otherwise Specified (“PDD-NOS”), so we describe Asperger’s Syndrome (also called Asperger’s Disorder) below. The 2013 revision of the Diagnostic and Statistical Manual of Mental Disorders, (“DSM-5”), a publication of the American Psychological Association, has enveloped all previously defined forms of autism into a single category. While those with ASD and their advocates emphasize the individuality of each person, there are diagnostic traits of those with ASD which can be spoken of in useful general terms.

### **A. Introduction to “Autism Spectrum Disorder”**

Autism is a neurobiological “brain-based” disorder,<sup>3</sup> characterized by social isolation, odd and pedantic speech, poor nonverbal communication, preoccupation with certain idiosyncratic interests,<sup>4</sup> or significant sensory processing difficulties in the form of hypersensitivity or hyposensitivity to environmental or social stimuli and sensory seeking behaviors. Autism is often sorted into “high” and “low” functioning. “High-functioning” individuals have relatively better language skills and intellect than “low” functioning peers. Still, they can great difficulty in other areas such as ability to live independently, and often exhibit a severe lack of social understanding. As a result, the term “high functioning” in relation to ASD is usually considered a “misnomer.”<sup>5</sup> In

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<sup>3</sup> Tantam, D. “The Challenge of Adolescents and Adults with Asperger Syndrome.” 12 CHILD ADOLESCENT PSYCHIATRY CLINIC OF NORTH AMERICA 143 (2003), at 147.

<sup>4</sup> Klin, Ami, James McPartland, and Fred R. Volkmar, “Asperger Syndrome.” Handbook of Autism & Pervasive Development Disorders, 3rd Edition. Vol. 1: Diagnosis, Development, Neurobiology, & Behavior. Eds. Fred R. Volkmar, Rhea Paul, Ami Klin, and Donald Cohen. New York: Wiley, Anthony & Sons, Inc. (2005) at 89.

<sup>5</sup>Though the term “high functioning” is often used, it is rarely properly qualified. It only signifies that the individual with autism has average intelligence or higher, and language abilities. It does not speak to the severity of autism related deficits in other areas, especially social functioning. Thus, especially in the present context, this descriptor can be very misleading and has been identified as a misnomer.” Alvares, Bebbington, Cleary, et al. (2020). The misnomer of ‘high functioning

the past few decades, the clinical understanding of these conditions has improved enormously and a large body of research literature and clinical experience has created a universally accepted understanding that those with this condition are often severely impaired in the social learning skills needed to understand social mores and the boundaries of appropriate behavior.

Because of their difficulty absorbing social norms, individuals with ASD may engage in socially disapproved or unacceptable behavior, unaware of wrongdoing or how their behavior is viewed by others. Though interested in sex and romance, their social isolation leaves them with very limited sociosexual understanding, oblivious to the sexual boundaries that their typically developed peers take for granted. At the same time, described as "rule bound" by therapists and others who work with them, individuals with ASD are eager to learn the social rules of behavior needed to "fit in," and tend to assiduously follow them once understood. The difficulty lies in properly understanding these social rules and boundaries.

Those with ASD are *not* more likely to commit crimes. However, because of their social naïveté, failure to perceive the feelings of others, ignorance of social norms, and lack of "common sense," they may well engage in behavior that appears deviant, but perceive no "red flags" that the behavior is inappropriate. Thus, "much of the deviant or sexual offending behavior exhibited among those with ASD is often a manifestation of their ASD symptoms, and not malice."<sup>6</sup>

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autism': Intelligence is an imprecise predictor of functional abilities at diagnosis, *Autism* 24(1):221-232; Saulnier, C., Klin, A. (2007). Brief Report: Social and Communication Abilities and Disabilities in Higher Functioning Individuals with Autism and Asperger Syndrome, *J Autism Dev Disord* 37:788-793.

<sup>6</sup>M. Mogavero, J. INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR, 7, No. 3, 2016, pp. 116-126. (Literature review. "This paper addresses individuals with ASD who exhibit sexually deviant and criminal sexual behavior with an intended audience of CJS professionals); Lindsay, W., Carson, D., O'Brian, G., Holland, A., Taylor, J.L., Wheeler, J.R. and Steptoe, L. (2014), "A comparison of referrals with and without autism spectrum disorder to forensic intellectual disability services," *PSYCHIATRY, PSYCHOLOGY AND LAW*, Vol. 21 No. 6, pp. 947-54. ("Those with ASD had similar patterns of offending to those without but they showed a lower prevalence of contact sexual offences and fewer had been previously charged.")

In the the criminal justice system, understanding of ASD lags far behind what is needed to achieve just results.<sup>7</sup> Here, as in other social structures like schools, communities, places of employment, and government service, it is the obligation of those making decisions to understand these features and their consequences.

## **B. The neurological roots and social effect of autism**

ASD is rooted in the structure of the brain. It is *not* a mental illness like depression or bipolar disorder which can be treated with therapy or drugs. It does not “come and go” as other disorders do, nor can it be effectively treated with drugs or intensive therapy. It is permanent, life-long, and usually present (as in Michael’s case) from birth. The only way to combat the deficits of ASD is to provide support and education to the affected person to help them learn some of the social conventions which they otherwise overlook. As Dr. Ami Klin, the author of the description of Asperger’s Disorder in the DSM-IV in 1994, and his teams of researchers have shown repeatedly, the individual with ASD simply *does not see* those countless cues in expression, intonation, and “body language” that give meaning to social interactions and communication.<sup>8</sup>

### *1. The failure to “see” the social world*

Dr. Klin’s research uses “eye tracking” technology which shows exactly where a person looks at an image. Individuals with ASD were compared with typically developed individuals (same age and IQ) watching a scene from the 1966 movie *Who’s Afraid of Virginia Woolf*. The autistic

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<sup>7</sup> See, Judge Kimberly Taylor (retired), Dr. Gary Mesibov, and Dennis Debbaudt, “Autism in the Criminal Justice System,” AANE 2009. Attached as **Exhibit E**.

<http://www.aane.org/asperger-syndrome-criminal-justice-system/>

A recent commentary in the Dallas Morning News online version is but one example of public concern about this problem. Shaheen Pasha, “The U.S. justice system has an autism problem,” A u g u s t 1 5 , 2 0 1 7 .  
<https://www.dallasnews.com/opinion/commentary/2017/08/15/us-justice-system-autism-problem>

<sup>8</sup> <https://www.dallasnews.com/opinion/commentary/2017/08/15/us-justice-system-autism-problem>. Klin, Ami et al. “Defining and Quantifying the Social Phenotype in Autism.” 59 AM J PSYCHIATRY 59.6 (2002) : 895-908.

individuals focused entirely on the mouth and lower portion of the actors' faces, whereas the neuro-typical viewer focused primarily on the eye region. The autistic individual missed the scene's meaning. They did not even glance at the action in the background, while the typical viewer focused on the entire scene. This was the account in the New York Times of this seminal research:

Enlisting Richard Burton and Elizabeth Taylor and a high-tech eye-tracking device developed for the military, researchers at Yale ran experiments that came closer than anything yet to offering a look at the world as seen through the eyes of people with autism.

In one experiment, described in the current issue of The American Journal of Psychiatry, the researchers compared the eye movements of a highly intelligent autistic adult and a control subject of the same age, sex and I.Q. as they watched the relentless emotional conflicts of "Who's Afraid of Virginia Woolf?"

What the experiment showed was that the two subjects were seeing the movie in starkly different ways. When Mr. Burton and Ms. Taylor, playing an alcoholic professor and his shrewish wife, confronted each other face to face, the gaze of the nonautistic adult swung intently between their eyes, while the autistic subjects looked back and forth, as well – but focused on the actors' mouths.

When Ms. Taylor flirted with George Segal, playing a young professor, as her husband lurked in the background, the gaze of the nonautistic adult described a triangle as he followed the expressions of all three. The autistic man never looked at Mr. Burton or anyone's eyes.

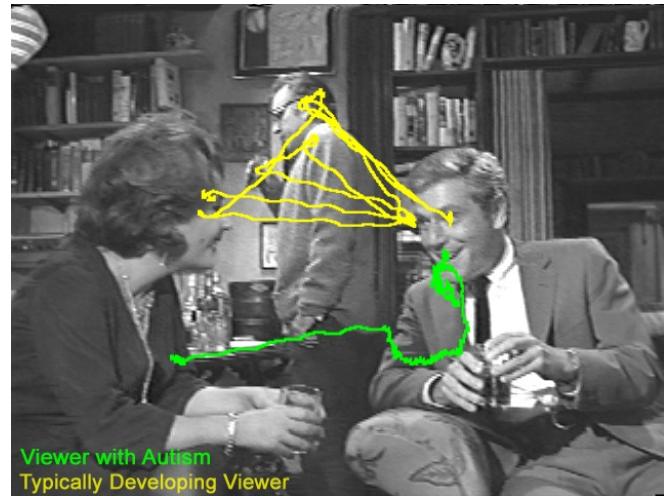
\* \* \*

Dr. Klin said eye-tracking fitted into a developing theory about the delay in symptoms. The problem is not just abnormal brain structure, but a stunting of brain development because of the limited social input that comes from a focus on objects rather than people.

"We are," he said, "the sum of all our experiences."<sup>9</sup>

While the neurotypical individual would notice all the body language and intonation and facial expressions in the scene involving two people conversing, and pick up on things going on in the background, the individual with ASD would focus on the mouths and the words spoken, focusing only on the literal speech being made. Numerous studies have replicated this tracking of mouths over eyes.<sup>10</sup>

As a result of their inability to read others' faces or take in the entirety of a social scene, those with ASD do significantly worse than the controls in recognizing fear, disgust, anger, sadness - they are impaired in recognizing emotions that involve mainly perception of the eyes and regions around the eyes.<sup>11</sup> Similar research shows marked difficulty in identifying emotions and mental states in pictures of from context.<sup>12</sup>



<sup>10</sup>. E.g., Pelphrey KA, Sasson NJ, Reznick JS, Paul G, Goldman BD, Piven J, Visual scanning of faces in autism, *J AUTISM DEV DISORD*. 2002 Aug;32(4):249-61; Anderson CJ, Colombo J, Jill Shaddy D, Visual scanning and pupillary responses in young children with Autism Spectrum Disorder, *J CLIN EXP NEUROPSYCHOL*. 2006 Oct;28(7):1238-56.

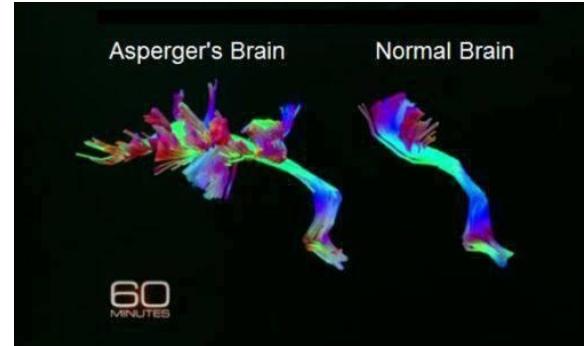
<sup>11</sup>Baron-Cohen, Impaired recognition of negative basic emotions in autism: A test of the amygdala theory, *SOCIAL NEUROSCIENCE*, 2006, 1 (3 4), 349 363; Corden B, Chilvers R, Skuse D, Avoidance of emotionally arousing stimuli predicts social-perceptual impairment in Asperger's syndrome, *NEUROPSYCHOLOGIA*. 2008 Jan 15;46(1):137-47. Epub 2007 Aug 15.

<sup>12</sup>Golan O, Baron-Cohen S, Systemizing empathy: Teaching adults with Asperger syndrome or high-functioning autism to recognize complex emotions using interactive multimedia, *DEVELOPMENT AND PSYCHOPATHOLOGY* 18 -2006, 591–617; Individuals with Asperger's do not attribute mental states spontaneously, but they may be able to do so in explicit tasks through compensatory learning; Baez S, Rattazzi A, Gonzalez-Gadea ML, Torralva T, Vigliecca NS, Decety J, Manes F, Ibanez A, Integrating intention and context: assessing social cognition in adults with Asperger syndrome, *FRONT HUM NEUROSCI*. 2012 Nov 8;6:302: "Adults with AS seem to perform less well in tasks that require an implicit encoding of socially relevant information and automatic context integration.".

Other research shows those with ASD having difficulty recognizing and distinguishing faces, particularly by gender or age.<sup>13</sup> For those with ASD, faces tend to be seen as objects made up of parts, not as part of a whole.<sup>14</sup>

## 2. *The autistic brain is different*

This research illustrate's the autistic brain's difficulty in processing the critical nonverbal information which it simply cannot process quickly enough: in order to avoid confusion and "overload" it simply shuts out the information by avoiding it. A variety of brain scanning research actually shows that the typical autistic brain has a different structure in those passageways that convey sensory information.<sup>15</sup> The problem is not just abnormal brain structure, but also stunted brain development.



## 3. *The consequences of being unable to read social interactions*

From social interactions, the mind learns how to instantly "read" other people from all the countless nonverbal cues in their facial expression, intonation, and body language. Typical people develop the intuitive ability to imagine how other people feel and what their intentions are. By

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<sup>13</sup>Behrmann, Marlene, Cibu Thomas, and Kate Humphreys. "Seeing It Differently: Visual Processing in Autism." TRENDS IN COGNITIVE SCIENCES 10.6 (2006): 258–64. Web. Apr. 2014

<sup>14</sup>Schulz, Gauthier, Klin, Fulbright, Anderson, Volkmar, Skudlarski, Lacadie, Cohen, Gore, "Abnormal ventral temporal cortical activity during face discrimination among individuals with autism and Asperger syndrome" ARCH GEN PSYCHIATRY. 2000 Apr;57(4):331-40

<sup>15</sup> Researchers have used High Definition Fiber Tracking (HDFT) to "map the brain cables much like how X-rays map the bones of the body" showing pathways in the brain's white matter to illustrate differences in brain functioning in basic research of brain structure (what parts of the brain connect) and clinical diagnosis of trauma (Traumatic Brain Injury -TBI), pathology (brain tumors in neurosurgery), neurodevelopment disorders (autism), and neurodegeneration (Alzheimer's). The image here derives from an image of the brain of Temple Grandin, arguably the most famous person with Autism in the U.S., compared with a typical control. <http://www.lrdc.pitt.edu/hdft/>

understanding others, the typical person also learns about their own feelings and how to express them. Collectively, these experiences give a sense of what behaviors are appropriate, developing intuition as to how the social rules we learn will be applied in novel situations. It is from thousands of reciprocal social interactions, from birth to adulthood, that we learn social mores, taboos, and develop “common sense” as to what is appropriate and inappropriate behavior.

Dr. Ami Klin once gave a TED talk<sup>16</sup> in which he discussed how the perception of nonverbal social cues—looking at the eyes of others from infancy on—gives us the ability to understand how others feel and predict their actions:

As a scientist, I always wanted to measure that resonance, that sense of the other that happens so quickly, in the blink of an eye. We intuit other people's feelings; we know the meaning of their actions even before they happen. We're always in this stance of being the object of somebody else's subjectivity. We do that all the time. We just can't shake it off. It's so important that the very tools we use to understand ourselves, to understand the world around us, are shaped by that stance. We are social to the core.

As part of his Nobel Prize-winning work, Daniel Kahneman, Professor *Emeritus* of Psychology at Princeton, makes exactly the same observation. In his best-selling book *Thinking, Fast and Slow*, Kahneman describes the natural human inclination to see the social, the mental, and the psychological everywhere in the world around us. He refers to work of psychologists Heider and Simmel in the 1940's.

In 1944, at about the same time as Michotte published his demonstrations of physical causality, the psychologists Fritz Heider and Mary-Ann Simmel used a method similar to Michotte's to demonstrate the perception of intentional causality. They made a film, which lasts all of one minute and forty seconds, in which you see a large triangle, a small triangle, and a circle moving around a shape that looks like a schematic view of a house with an open door. Viewers see an aggressive large triangle bullying a smaller triangle, a terrified circle, the circle and the small triangle joining forces to defeat the bully; they also observe much interaction around a door and then an explosive finale. . . . All this is entirely in your mind, of course. Your mind is ready and even eager to identify agents, assign them personality traits and specific intentions, and view their actions

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<sup>16</sup> Available online at: [https://www.ted.com/talks/ami\\_klin\\_a\\_new\\_way\\_to\\_diagnose\\_autism](https://www.ted.com/talks/ami_klin_a_new_way_to_diagnose_autism)

as expressing individual propensities. Here again, the evidence is that we are born prepared to make intentional attributions: infants under one year old identify bullies and victims, and expect a pursuer to follow the most direct path in attempting to catch whatever it is chasing. [p.

In the midst of this observation, where the ellipses appear, Kahneman observes as matter of fact that, “The perception of intention and emotion is irresistible; only people afflicted by autism do not experience it.” The importance of social perception for Kahneman is apparent at the beginning of his book. The first chapter opens with this picture of the face of an obviously angry woman:

Your experience as you look at the woman’s face seamlessly combines what we normally call seeing and intuitive thinking. As surely and quickly as you saw that the young woman’s hair is dark, you knew she is angry. Furthermore, what you saw extended into the future. You sensed that this woman is about to say some very unkind words, probably in a loud and strident voice. A premonition of what she was going to do next came to mind automatically and effortlessly. You did not intend to assess her mood or to anticipate what she might do, and your reaction to the picture did not have the feel of something you did. It just happened to you. It was an instance of fast thinking.

In a video recording of a seminar on the “Marvels and Flaws of Intuitive Thinking,” in which he discusses reactions to this photograph in the context of his research on human judgment and decision-making, Kahneman identifies *perception* of the social world as the root of this intuitive thinking:<sup>17</sup>

Then there is another way that thoughts come to mind. You see this lady, and she's angry, and you know that she's angry as quickly as you know that her hair is dark. [in reference to a photo of a woman with an angry expression]. There is no sharp line between intuition and perception. You perceive her as angry. Perception is predictive. You know what she's going to say, or at least you know something about what it's going to sound like, and so perception and intuition are very closely linked. In my mind, there never was a very clean separation between perception and intuition. . . . But for us, certainly for me, the main thing in the evolutionary story about intuition, how intuition

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<sup>17</sup> [https://www.edge.org/conversation/daniel\\_kahneman-the-marvels-and-the-flaws-of-intuitive-thinking-edge-master-class-2011](https://www.edge.org/conversation/daniel_kahneman-the-marvels-and-the-flaws-of-intuitive-thinking-edge-master-class-2011)

grew out of perception, how it grew out of the predictive aspects of perception.

Like Dr. Klin, Dr. Kahneman describes capabilities that a typical infant would have but that **those with ASD will never have**. One of the ways those with autism compensate is by grasping at rules they are taught or can try to discern: “In this context, individuals with AS were said to mediate their social and emotional exchange through explicit verbal and logical means, cognitively, rigidly, and in a rule-governed fashion.”<sup>18</sup>

**Without social perception, social norms and taboos are not evident to the person with ASD**

When psychologists first defined the parameters of autism in 1978, one of the suggested criteria for the condition was "Disturbed Quality to relate appropriately to people, events and objects." The inability to develop social competence is the leading factor in the failure of most adults with autism to attain even a minimal level of quality in their lives.<sup>19</sup> (Howlin & Goode, 2000). Individuals with ASD see the concrete and do not grasp or “appreciate these unwritten rules of social engagement.”<sup>20</sup> “Everything that is not explicit, everything that is unstructured, everything that is not defined and expressly supported is a difficulty for individuals with [autism].” Rather, their behavior may appear “inappropriate or embarrassing when, in addition to failing to use these social niceties, they violate clear social conventions,” which often times results from an unawareness of other people’s feelings or point of view.<sup>21</sup> They often engage in behavior that is misunderstood by mainstream society, which expects adolescents or young adults exhibiting normal intelligence and

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<sup>18</sup> Fred R. Volkmar, Rhea Paul, Ami Klin, Donald J. Cohen, “Asperger Syndrome,” Chapter 4, *Handbook of Autism and Pervasive Developmental Disorders, Volume 1, Diagnosis, Development, Neurobiology, and Behavior*, 3rd Edition, Eds (Wiley 2005), page 105

<sup>19</sup> Howlin, P., & Goode, S. (2000). Outcome in adult life for people with autism and Asperger’s syndrome. *AUTISM*, 4(1), 63–83.

<sup>20</sup> Mesibov, Gary B., Victoria Shea, and Lynn W. Adams, “Understanding Asperger Syndrome and High-Functioning Autism.” *THE AUTISM SPECTRUM DISORDERS LIBRARY* 1. Kluwer Academic / Plenum Publishers (2001) at 10.

<sup>21</sup> *Id.*

language abilities to “act their age.” The consequence of all this is that those with ASD have to be *explicitly told* these untaught social rules, as every expert and parent experienced with autism will tell you.

Takeda *et al.* found intact external (subject to predetermined rules) moral reasoning, but impaired internal (autonomous) moral reasoning, particularly higher-level autonomous-altruistic moral reasoning, among children and adolescents with HFASDs relative to typical peers. [...] Individuals with HFASDs appear to learn specific behaviors most effectively via explicit, rules-based instruction; this type of learning appears to apply to the domain of moral reasoning and behavior as well.<sup>22</sup>

Researchers have noted for some time that, although young men with ASD are not more prone to criminality than their neurotypical peers, they seem susceptible to a range sexually offensive behaviors such as “inappropriate courtship scripts, exposing one’s genitals and/or masturbating in public, touching others in a sexual manner, and downloading child pornography.”<sup>23</sup> Researchers have noted that the effects of ASD itself “has a critical role among the minority who commit sexually-related offenses,” because of its effects on understanding social norms.<sup>24</sup>

Social competence for adolescents and adults involves not only knowing untaught social rules, but also how to interpret social situations in order to apply the rules. The problem is that the same neurological deficits which filter out the nonverbal social information in personal encounters also impair the ability to interpret whole social scenes, as Dr. Klin’s research has shown above.

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<sup>22</sup> Matthew D. Lerner, Omar Sultan Haque, Eli C. Northrup, Lindsay Lawer, and Harold J. Bursztajn, “Emerging Perspectives on Adolescents and Young Adults With High- Functioning Autism Spectrum Disorders, Violence, and Criminal Law,” 40 J AM ACAD PSYCHIATRY LAW 177, at 182 and 187 (2012)

<sup>23</sup> M. Mogavero, J. INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR, 7, No. 3, 2016, pp. 116-126. (Literature review)

<sup>24</sup> *Id.*, p. 116; Lindsay, W., Carson, D., O’Brian, G., Holland, A., Taylor, J.L., Wheeler, J.R. and Steptoe, L. (2014), “A comparison of referrals with and without autism spectrum disorder to forensic intellectual disability services,” PSYCHIATRY, PSYCHOLOGY AND LAW, Vol. 21 No. 6, pp. 947-54.

These individual are not just missing what we see in others' eyes, or facial expressions. They are missing the entire social scene.<sup>25</sup>

Michael Sutherin is here because he was never explicitly told the various implicit social rules which would have informed him about the propriety of talking to underage girls online and exchanging images with them, especially when it is apparent that they might be doing this with their peers. It was not "obvious" to him, as it is to everyone else without his condition, that this was inappropriate, and socially condemned, and viewed as illegal or immoral behavior. Had he gotten proper therapy earlier in life, and appropriate sexual education, his present circumstances might have been much different.

The DSM-5 observes that being rule-bound (i.e. steadfastly obeying rules which one *does* know and understands) is a trait under both domains of diagnostic criteria. Being rule-bound can be a problem for children, and frustrate their efforts to play with others. They will insist on adherence to rules, regardless of more or less accurate understanding of the rules, and complain about others violating the rules:

Children with Asperger's syndrome can be very rule-bound and need to learn that, when playing with a friend, it is possible sometimes to change the rules and be inventive, yet still have an enjoyable experience, and that this is not necessarily a cause for anxiety.

Tony Attwood "The Complete Guide to Asperger's Syndrome," (Jessica Kingsley Publ. 2007) at 68. Deprived of intuition, those with ASD try to grasp at rules: "Their poor intuition and lack of spontaneous adaptation are accompanied by marked reliance on formalistic rules of behavior and rigid social conventions." Ami Klin, "Autism and Asperger Syndrome: An Overview," Rev Bras Psiquiatr., 2006; 28(Supl I):S3-11, S9.

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<sup>25</sup>Sandra Baez, Alexia Rattazzi, María L. Gonzalez-Gadea, Teresa Torralva,

Nora Silvana Vigliecca, Jean Decety, Facundo Manes and Agustin Ibanez, "Integrating intention and context: assessing social cognition in adults with Asperger syndrome," FRONTIERS IN HUMAN NEUROSCIENCE, November 2012 | Vol 6|Article302.

### **“Rule bound” is a positive thing here**

Even typically developed “child pornography *only*” offenders are at extremely low risk of committing another such offense (1% over 6 years) and at very low risk of committing a hands on offense (3% over 6 years).<sup>26</sup> Those with autism possess traits that are the *opposite* of those who have identified risks for re-offending.<sup>27</sup> The general experience of those documented with ASD is that

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<sup>26</sup> According to the most recent data analysis by the most respected researchers, addressing *typically developed* individuals, the risks of reoffending as to child pornography for one who has no history of contact offenses is very low, and for a contact offense almost negligible. The actual risk factors are almost the antithesis of autism, while autism, as we have shown (see “Rule bound” above at p.[24](#)) is countervailing factor to risk.

The research on this is well known and not in dispute. Online offenders who had no history of contact offenses almost never committed contact sexual offenses, despite a comparably higher interest in photographs of children compared to contact offenders. Kelly M. Babchishin , R. Karl Hanson, Heather VanZuylen, “Online Child Pornography Offenders are Different: A meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children,” ARCH SEX BEHAV, 2014. There is only a 1% official recidivism rate for contact sexual offences and a 3% recidivism rate for child pornography offences after a *follow-up of up to 6 years*.

Michael C. Seto, R. Karl Hanson, and Kelly M. Babchishin, “Contact Sexual Offending by Men With Online Sexual Offenses,” SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT. 23(1) 124-145 (2011)

<sup>27</sup> The factors associated with risk are the opposite of autism. Antisociality is a major risk factor of sexual offending against children (Hanson& Bussie’re, 1998; Quinsey, 1986; Seto, 2008, 2013). Antisociality refers to a set of personality traits and attitudes that indicate a disregard for societal norms and the safety of others, a lack of remorse, impulsivity, and persistent rule breaking (American Psychiatric Association, 2013). This is the opposite of the diagnostic traits necessary for an ASD diagnosis. In contrast “child pornography only” offenders (“CPOs,”) like those with ASD tend to be *asocial*, not *antisocial*. They may engage in sexual fantasy about children looking at images, appreciate that it is morally wrong, and not act on it even when the opportunity presents itself. Those with ASD are particularly uncharismatic and do not have the social skills to engage children, and generally understand (though not always) the problem with touching them sexually. . Online-only offenders were more likely to have lifestyle and psychological barriers that prevent

rigid adherence to social rules can provide additional assurance that the inappropriate behavior will not occur again. “The tendency of individuals with AS to rely on rigid rules and routines can be used to foster positive habits and enhance the person's quality of life and that of family members.” Ami Klin, “Asperger's Syndrome Guidelines for Assessment and Diagnosis,” Learning Disabilities Association of America, June 1995, p. 10.

People suffering from AS display rigid behavior patterns and preference for order, discipline, organization and rules and regulations. The majority of AS sufferers is law abiding and is not involved in any violent activities []. Only a minority among them are involved in violent activities for which their criminal responsibility may be challenged.

Nachum Katz and Zvi Zemishlany, “Criminal Responsibility in Asperger's Syndrome,” ISR J PSYCHIATRY RELAT SCI, Vol 43 No. 3 (2006) 166–173, 171. “Because of the very rigid way in which many people with PDD tend to keep to rules and regulations, they may well be more law abiding than the population generally.” Svend Erik Mouridsen, Bente Rich, Torben Isager and Niels Jørgen Nedergaard, “Pervasive Developmental Disorders and Criminal Behaviour: A Case Control Study,” INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY (2008) 52; 196, 202. “However, autistic individuals might be less likely to commit crimes, considering ‘the very rigid way’ in which many of these individuals ‘tend to keep to rules and regulations.’” Christine N. Cea, “Autism and the Criminal Defendant,” 88 ST. JOHN'S LAW REVIEW, 501 (No. 2 2015). Research shows greater compliance with conditions of supervision by persons with ASD.

Youth with ASDs were also less likely to be charged with probation violations. This may be due to several factors, including increased rule adherence in youth with ASD, the fact that youth with ASD are

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them from acting directly on these interests (e.g., lower victim access, lower antisociality, greater victim empathy) than both SOC [“sexual offenders against children”] and mixed offenders. (Babchishin *et al.*, 2014). Other risk factors are related to general criminality, such as young age, prior violent offences, juvenile record, and total prior criminal history (Eke, Seto,&Williams, 2011; Seto&Eke, 2005). “Among child pornography users with pedophilia, the psychological factors that differentiate those who act on their interests and those who do not should be related to propensities for rule violation,” (Babchishin *et al.*, 2014), a propensity that is the opposite of the diagnostic criteria for ASD.

less likely to be prosecuted, and therefore less likely to serve probation, or because youth with ASD may be more closely supervised by adults than youth without a developmental disability.

Cheely, C.A., Carpenter, L.A., Letourneau, E.J., Nicholas, J.S., Charles, J., & King, L.B. The Prevalence of Youth with Autism Spectrum Disorders in the Criminal Justice System, *J AUTISM DEV DISORD* (2012) 42:1856–1862 (2012).

Now Michael has learned the rules about child pornography and online sexual activity, and he will adhere to them. No amount of prison is needed to accomplish this.

**Michael has learned the rules about child pornography and  
online sexual activity**

When confronted by the police, those with ASD are noticeably compliant and courteous to requests from the police.<sup>28</sup> When accused of wrongdoing by anyone in authority, and rules then being explained, they are very quick to internalize that rule and express guilt.<sup>29</sup> In a case involving a young man with ASD a few years ago in Iowa, the police executed a search warrant at his house and asked if he had viewed child pornography. When it was apparent that he was not sure why they were there, they explained to him that viewing child pornography is bad because it creates a market for child pornography, which creates incentive for people to abuse children and produce more. Later, when he was being questioned about whether he had “distributed” child pornography, the young man said he would not ever do so because it would create “a market” for the images. This was a concept he had no knowledge of before talking to the police that day, but it had now been incorporated as part of his “memory” of earlier events. This phenomenon is a challenge for psychologists and defense attorneys who try to understand what the person with ASD might have thought about this

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<sup>28</sup> North, A., Russell, A. and Gudjonsson, G. (2005) ‘An investigation of potential vulnerability during police interrogation of adults with autism spectrum disorder: a focus on interrogative suggestibility and compliance.’ Paper presented at the 1st International Symposium on Autism Spectrum Disorder in a Forensic Context, September, Copenhagen, Denmark.

<sup>29</sup> Dennis Sugrue, “Forensic Assessment of Individuals on the Autism Spectrum Charged with Child Pornography Violations,” Ch. 4, p. 127 in *Caught in the Web of the Criminal Justice System*, Lawrence A. Dubin, J.D. and Emily Horowitz, Ph.D., Eds. (Jessica Kingsley Publ. 2017)

activity before told by the police—perhaps for the first time in their lives—that such activity is wrong and illegal.

### C. Counterfeit deviance

A useful way to conceive of the problem presented in this case is in the term “counterfeit deviance.” First used by Hingsburger, Griffiths, and Quinsey in 1991,<sup>30</sup> counterfeit deviance occurs when an individual engages in behavior that “topographically look[s] like a Paraphilia but lack[s] the recurrence of and the pathological use of sexual fantasies, urges, or behavior.”<sup>31</sup> In other words, it is when a person does something which appears to be caused by psychological deviance, but which is actually the product of a disability or other mental issue which is not inherently deviant or pathological. The fourth edition of the DSM acknowledges that in certain individuals “there may be a decrease in judgment, social skills, or impulse control that, in rare instances, leads to unusual sexual behavior” that is distinguishable from Paraphilia and considered a differential diagnosis.<sup>32</sup>

While ASD is not categorized as an Intellectual Disability (“ID,” what was formerly known as “mental retardation”) because of the usual presence of average to high intelligence, there is significant overlap between those with ID and ASD, including similar deficits in adaptive functions and socialization skills. For example, when compared to neuro-typical individuals, those with ID exhibit a “lack of sociosexual skills and knowledge, decreased opportunities for sociosexual behavior, sexual victimization, difficulties projecting consequences, and difficulties recognizing and

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<sup>30</sup> Hingsburger, D., D. Griffiths, and V. Quinsey. “Detecting Counterfeit Deviance: Differentiating Sexual Deviance from Sexual inappropriateness.” *The Habilitative Mental Healthcare Newsletter*. 10 (1991) : 51-54. Dorothy Griffiths, Ph.D., is an expert in the field of developmental disabilities and sexual abuse or offenses. She is an Associate Dean for the Faculty of Social Sciences at Brock University in St. Catharines, Ontario, and has treated individuals with AS accused of sexual offenses.

<sup>31</sup> Dorothy Griffiths, et al., *Sexual and Gender Identity Disorders*, in *DIAGNOSTIC MANUAL-INTELLECTUAL DISABILITY: A TEXTBOOK OF DIAGNOSIS OF MENTAL DISORDERS IN PERSONS WITH INTELLECTUAL DISABILITY* 424, 427 (2007) [hereinafter DM-ID].

<sup>32</sup> DSM-IV-TR. Washington, D.C.: American Psychiatric Association, 2000. At 568.

expressing emotions.”<sup>33</sup> The same is true of individuals with ASD, who are more likely to be victims than victimizers, and who also have difficulty understanding the social cues and emotions that are all around them.<sup>34</sup> This overlap makes the concept of counterfeit deviance equally applicable to both ID and AS because the person’s IQ has no bearing on their deficits.<sup>35</sup> Those with ASD can indeed be and appear “smart” in many ways, but this masks the true extent of their disability.

Autism research literature is loaded with depictions of inappropriate sexual behavior by those with ASD. A recent review of this literature highlights the common—but mistaken—conclusion that this is a problem of the disorder:

Inappropriate sexual behaviors may reflect common ASD symptoms (e.g. repetitive patterns of behavior, inappropriate use of speech, and fixations on people or objects). Haskins and Silva (2006) described an adult white male who was fixated on adult black males and would compulsively proposition black male strangers for sex. Chesterman and Rutter (1993) described an adult male with AS in London who was fixated on washing machines and would masturbate as he watched them in use. Police later arrested him for burglary as he attempted to break into a neighbor’s residence to access their washing machine. Conflict arises when such behavior creates fear and psychological harm to victims and society demands punishment (Debbaudt, 2004). However, the behaviors were characteristics of the perpetrator’s symptomology with no malice intent.

Deviant sexual behaviors may be the result of naiveté of courtship, inability to handle rejection, and/or inability to grasp social mores with regard to socially appropriate behaviors. Wing (1981) described individuals with AS in London with sexual desires that led them to touch or kiss strangers. A common sexual behavior described in the research among adolescent and adult males with ASD was touching female strangers on the breasts and genitals (Stokes et al., 2007; Cooper et al., 1993; Kohn et al., 1998). The example Kohn et al. (1998) provided was a 14-year old male with AS who claimed

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<sup>33</sup> *Id* at 428.

<sup>34</sup> Klin, Ami et al., *supra* note 28, at 899; Mesibov et al., *supra* note ?, at 10.

<sup>35</sup> Griffiths, Dorothy and J. Paul Fedoroff. “Persons With Intellectual Disabilities Who Sexually Offend.” *Sex Offenders: Identification, Risk Assessment, Treatment and Legal Issues*. Ed. Fabian M. Saleh, et al. New York: Oxford University Press, 2009. 353-378. At 362.

he touched the female in order to “make her his girlfriend” (p. 295). . . . Such examples of deviant sexual behavior may be the result of severe social interaction impairments characteristic of ASD.<sup>36</sup>

Dr. Denise C. Kellaher, a Forensic Psychiatrist who manages a VA mental health unit, and who has done a great deal of work in the California prison system with sex offenders, published an article<sup>37</sup> where she directly applied the concept to ASD:

### **Counterfeit Deviance**

In the ASD population, deviant sexual behavior could stem from a paraphilia or it may represent “counterfeit” deviant sexual behavior. Counterfeit deviance characterizes sexual behavior that may appear to arise from a paraphilia but instead it originates from a lack of sexual knowledge and experience and from poor social skills.<sup>38</sup>

When an individual with AS is accused of deviance or a sexual offense, a careful assessment must be conducted to determine if a paraphilia is indeed present, which is not impossible,<sup>39</sup> or if the differential diagnosis of counterfeit deviance applies.

A lack of sexual outlets with peers may lead individuals to explore the internet for sexual education or to satisfy sexual needs (Attwood et al., 2014). Eustacia Cutler, mother of Temple Grandin, authored a blog post on this topic and described her concerns about the use of computers and pornography. Exploration of internet pornography may eventually lead to child pornography. If one is “stuck” in adolescence, they may prefer child pornography. Rather than learning about sex from adults, they prefer adolescents to show them (Cutler, 2013). Although viewing pornography is not deviant or criminal, it crosses moral and legal lines when children view pornography, adults show

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<sup>36</sup>Mogavero, *supra* n. [6](#) at p. 119.

<sup>37</sup> Sexual Behavior and Autism Spectrum Disorders: an Update and Discussion, in *Current Psychiatry Reports*, 2015:17:25.

<sup>38</sup> [fn 52 in original] Hingsburger D, Griffiths D, Quinsey, V., “Detecting counterfeit deviance: differentiating sexual deviance from sexual inappropriateness.” *Habilitative Mental Healthc Newsltr*. 1991:51–54.

<sup>39</sup> See Griffiths, et al., *supra* note [31](#), at 427.

pornography to children, or the images depicts minors. Problems arise when individuals with ASD are unaware they have committed a crime. . . .<sup>40</sup>

## ASD and Other Vulnerabilities

Aside from specific impairments, a helpful term, "mindblindness," is used to describe other characteristics of autism that are important to understand. For this we return to "Theory of Mind," ("ToM") and how it is developed. In Chapter 2 of "Mindblindness," "Evolutionary Psychology and Social Chess,"<sup>41</sup> Baron-Cohen demonstrates from the view of evolutionary psychology how "the inherited architecture of the human mind is the product of the evolutionary process" and how "the evolution of a mind-reading capacity" in typically developed individuals is illustrated by the phenomenon of autism, "a genetic pathology that causes certain individuals to be born mind blind."

Evolutionary psychology looks at the brain (and thus the mind) as an organ that, via natural selection, has evolved specific mechanisms to solve particular adaptive problems.

*Id.* at 12. This "blindness" makes those with ASD susceptible to certain traits and behaviors which also, as in this case, can contribute to unwitting misconduct.

### A. Credulity and gullibility

"Children or adults with Asperger's syndrome can be confused by sarcasm, and prone to teasing by others, as they are remarkably gullible and assume that people say exactly what they mean." Attwood, 2007, p.116. Greenspan, Loughlin, and Black (2001)<sup>42</sup> describe 'a tendency to believe something, usually a highly questionable statement or claim, despite scanty evidence' (p. 102) and 'a vulnerability to being tricked or manipulated' (p. 102). Low social intelligence and specifically

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<sup>40</sup>Mogavero, *supra* n. 6 at p. 119-120.

<sup>41</sup>Baron-Cohen, S.. *Mindblindness: An essay on autism and theory of mind*. Cambridge, Mass: MIT Press (1995). ("Mindblindness")

<sup>42</sup>Greenspan, S., Loughlin, G., & Black, R. S. (2001) ("Greenspan et. al."). Credulity and gullibility in people with developmental disorders: A framework for future research. In *International review of research in mental retardation* (Vol. 24, pp. 101-135). Academic Press.

high credulity and gullibility lie at the heart of poor social outcomes for children and adults with ASD.<sup>43</sup> Sofronoff, Dark, Stone "Social vulnerability and bullying in children with Asperger syndrome, Autism," 15(3) 355–372 (2011). (Showing that gullibility and credulity not only correlate with each other but that they are predictors of bullying.)<sup>44</sup> Those with ASD cannot see that someone might be trying to mislead or trick them; they are typically described by these traits:

- Is easily fooled
- Believes someone when they have lied to them in the past
- Lent money or things to someone who is unlikely to repay
- Been deceived by someone who has already deceived them before
- Done something that has got them into trouble at the suggestion of others
- Doing unreasonable favours with little chance of return
- Tricked into buying another child's lunch or treats
- Believe what s/he is told regardless of source reliability
- Believe what s/he told regardless of prior deception by same person
- Tricked into giving up objects of value
- Believes things that other people would view as clearly untrue
- Given in to suggestion to say something that could get into trouble for
- Believes many things that sees/reads in advertisements/internet
- Believes rumours even when come from unreliable source

Sofronoff, et al. supra note 84, p. 362.

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<sup>43</sup>Greenspan et. al., supra note 82.

<sup>44</sup>Sofronoff, K., Dark, E., & Stone, V. (2011) (Herinafter "Sofronoff et. al."). Social vulnerability and bullying in children with Asperger syndrome. *Autism*, 15(3), 355-372.

## **B. Executive functioning**

Executive functioning involves those skills needed to assess one's situation and manage oneself and one's resources in order to achieve a goal. It involves neurological skills such as working memory, fluid reasoning, the ability to envision alternative outcomes from available choices, and the ability to rationally weigh the risks and advantages of competing choices.

Executive functions (EFs) make possible mentally playing with ideas; taking the time to think before acting; meeting novel, unanticipated challenges; resisting temptations; and staying focused. Core EFs are inhibition [response inhibition (self-control—resisting temptations and resisting acting impulsively) and interference control (selective attention and cognitive inhibition)], working memory, and cognitive flexibility (including creatively thinking "outside the box," seeing anything from different perspectives, and quickly and flexibly adapting to changed circumstances).

Adele Diamond, Executive Functions, ANN REV PSYCHOL. 2013; 64: 135–168.

It can be bewildering to observers how a young man with ASD can persist in the pursuit of an objective, or in the use of certain means, without noticing otherwise obvious signals that the objective or the means, or both, are unwelcome, inappropriate, or illegal. A great part of this is always ToM deficits in understanding norms and social scenes. But a great deal of it is a combination of other things, including executive function, and the inability envision outcomes and to imagine or consider alternative approaches.

## **C. Online addiction**

Those with ASD can be susceptible to obsessive playing of computer games. Persons with autism are by nature starved for interpersonal interaction on an authentic level and desperate to discover their own sexuality through the same urges everyone feels. Dr. Whitney draws the comparison to ASD: "Individuals with ASD have such a long histories of social failure. *Desiring to be a sexualized being is one of the drives in all of us, but people on the autism spectrum don't know how to appropriately meet that need.* Being deprived of this reward, we are neuro-chemically unbalanced and are likely to seek balance anywhere it appears we can find it."

## **D. Bullying**

Those with ASD are usually bullied in school. Without “mind reading” skills, they lack the ability to see the malicious intentions of their tormentors and frequently mistake their intentions as “friendly;” they tend to see any attention at all as being “friendship.”<sup>45</sup> They often do not understand how the joke is on them, and tend to be compliant, which further inspires bullying.<sup>46</sup> A child with ASD has difficulty understanding teasing and can neither reciprocate good natured teasing nor distinguish it from malice.<sup>47</sup> “Social vulnerability was found to be strongly and positively correlated with bullying in children with AS.” *Id.* 369.<sup>48</sup>

## **E. “Not learning his lesson”**

It can appear, at times, that those with ASD repeatedly engage in behavior that they are told not to do. This would seem to be at odds with the notion that those with ASD are “rule-bound” as described above. Those who do not routinely work with autism often see this behavior as wilfulness and disregard for the feelings or safety of others, antisocial traits. Especially where the prior incident(s) resulted in some outcry or law enforcement intervention, it is natural to say, “he should have *learned his lesson.*”

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<sup>45</sup>A. Jawaid, et al., “‘Too withdrawn’ or ‘too friendly’: considering social vulnerability in two neuro-developmental disorders. 56 JOURNAL OF INTELLECTUAL DISABILITY RESEARCH 335-350 (2012).

<sup>46</sup>Wainscot, J. J., Naylor, P., Sutcliffe, P., Tantam, D., & Williams, J. V. (2008). Relationships with peers and use of the school environment of mainstream secondary school pupils with Asperger syndrome (high-functioning autism): A case-control study. *International Journal of Psychology and Psychological Therapy*, 8(1).

<sup>47</sup>Heerey, E. A., Capps, L. M., Keltner, D., & Kring, A. M. (2005). Understanding teasing: Lessons from children with autism. *Journal of Abnormal Child Psychology*, 33(1), 55-68.; Sofronoff et. al., *supra* note 44, at 368: “social vulnerability was an independently significant predictor of peer victimization.”)

<sup>48</sup>Sofronoff et. al., *supra* note 44, at 369.

There are several problems with this reflexive thinking. The learning method for persons with autism is very different. Persons with ASD have diminished capacity to abstract from one experience to another arguably similar experience, and to abstract from the application of a “social rule,” in one instance to an arguably similar instance, and difficulties in executive function in applying what they have learned.

While persons with autism may be very good at rote learning of facts, when it comes to learning social roles and how they apply in any particular circumstance, very explicit, step-by-step instruction is required.<sup>49</sup> The “lesson” we would take from an adverse experience is not the same lesson for a person with autism. Every aspect of the “rule” has to be broken down and addressed, and the person has to be tested on his understanding of the principle.

#### **F. “Candor”**

It is frequently observed that persons with ASD are “candid to a fault.” This can appear as “rudeness” in the unfiltered expression of thoughts which may be embarrassing or offensive to others, owing to the failure of the person with ASD to be thinking of or discerning the feelings or sensibilities of others. “Your arms are very fat.” “Your skin is black.” But this lack of filtering can

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<sup>49</sup> “For older or higher-functioning children, the core of the educational program should be an intensive focus on social and communication skills training. Positive actions in frequently troublesome situations may have to be rehearsed and scripted. Concrete social and communication skills—including eye gaze, voice modulation, gestural communication, posture, proximity, greeting behaviors, rules of conversation, and social expectations—may have to be taught in a very explicit fashion. Children whose vocalizations are just emerging and for whom vocal communication is a realistic goal. The setting for the social and communication skills therapy may have to alternate between small group instruction (in which appropriate behaviors can be practiced and supportive feedback can be gained) and naturalistic settings (in which the newly acquired skill can be put to practice or additional problematic behaviors can be identified for practice in the small setting). Successful techniques used for this purpose include modeling of behaviors by an instructor, self-observation, role playing, and the use of individualized social stories. The advent of numerous computer interventions and applications adaptable to the individual’s situation and levels of functioning are now available.” Fred Volkmar, M.D., Ami Klin, Ph.D., Robert T. Schultz, Ph.D., Matthew W. State, M.D., Ph.D., “Chapter 44 - Autism Spectrum Disorder and Social Communication Disorder Kaplan Sadock, p. 3585 (2017)

also appear in lack of filtering in giving a narrative. Here, again, the person with ASD is not thinking about the feelings or sensitivities of the listener, and therefore does not choose words or content to avoid being offensive. By the same token, the individual with ASD is unlikely to be able to tailor a narrative, or “spin” it to suit the expectations of the listener, to achieve an emotional effect, to distort or deceive, to make an account more interesting or fantastic or believable. All such tactics require understanding how others think, and a lifetime of practice at influencing thoughts.

## **G. Inappropriate affect**

Inappropriate facial expressions, including smiling or laughing inappropriately, are diagnostic indicators for ASD. The original set of diagnostic criteria, outlined by Gillberg and Gillberg in their seminal publication,<sup>50</sup> refers to “non-verbal communication problems” including “inappropriate facial expression.” This is also a diagnostic criteria under DSM V<sup>51</sup> and is described as “incongruent” or “inappropriate” “affect.” It has long been noted that such non-verbal communication deficits are a serious problem in encounters with police, because inappropriate facial expressions suggest to police many negative things *other than* the actual developmental disability that is its cause, such as lack of remorse, sadism, psychopathy, mental illness:

The perceived lack of empathy or remorse is legally significant because it might be mistaken as an indicator of psychopathy. Psychopaths are human predators, while AS individuals are socially naive and immature. While both give the impression of a lack of empathy, the psychopath actually has no remorse, whereas the AS individual's outward communicative cues simply do not express remorse in expected and anticipated ways.

Brian Wauhop, “Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual with Asperger's Syndrome,” 27 PENN STATE INTERNATIONAL LAW REVIEW, 959 (2009).

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<sup>50</sup>Carina Gillberg and Christopher Gillberg, “Asperger Syndrome - Some Epidemiological Considerations: A Research Note, 30 J. CHILD PSYCHOL. PSYCHIATRY 631, 631-38 (1989).

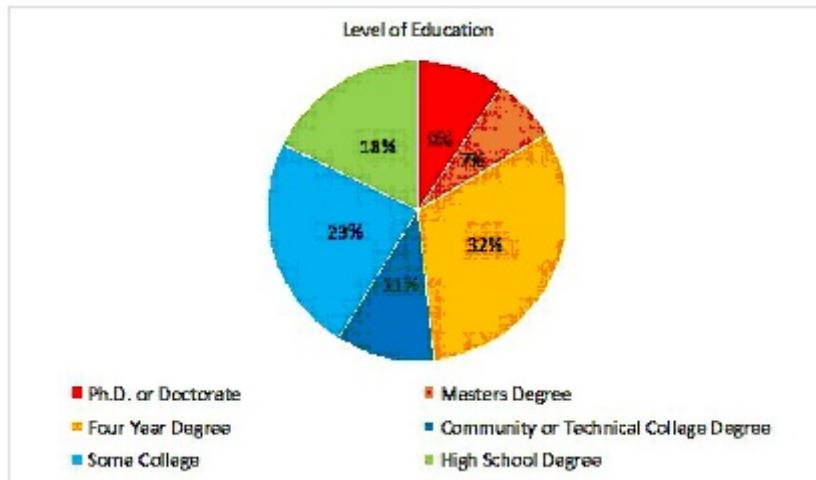
<sup>51</sup>DSM V refers to “2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.”

## **Knowledge of Child Pornography Laws and Moral Standards in the ASD Community**

In early 2019, challenged by a District Court judge in Texas who found it hard to believe that an intelligent person, even with ASD, might not understand the strong social taboos related to looking at child pornography, or soliciting sexually explicit photographs in children, we created a Google Forms survey to get the impressions of persons with ASD on the question of appreciation of social taboos. This was not perfect social science methodology in many ways, but the results are valuable. The link to the questionnaire was circulated on Facebook pages for autism groups and was sent out by autism organizations, and also by Twitter accounts of persons with ASD.

Overall there were 351 people who responded to the questionnaire from all over the US and even Canada. Oddly the vast majority were women, and nearly 1/4 were individuals who did not identify as male or female, but as “non-binary” or “agender” or otherwise. About 10% did not have an autism diagnosis. They were excluded from the final calculations as well as anyone who did not identify as male. We were only interested in results actually from males, but felt it important in this context not to exclude people given the wide range of narrow diverse individuals who would be exposed to the link.

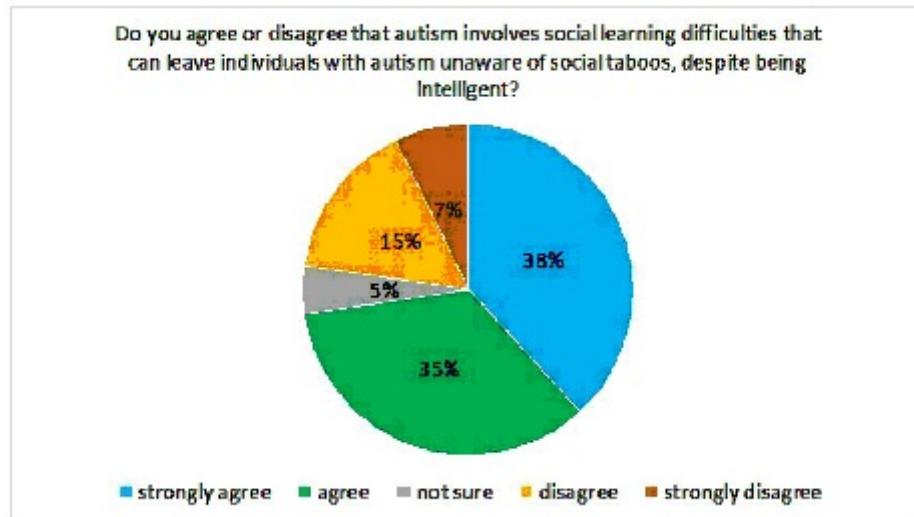
We ended up than with 84 qualified respondents. As can be seen, 82% of the respondents have education beyond high school. Nearly half have a four year degree or higher. They listed a wide array of professions.<sup>52</sup>



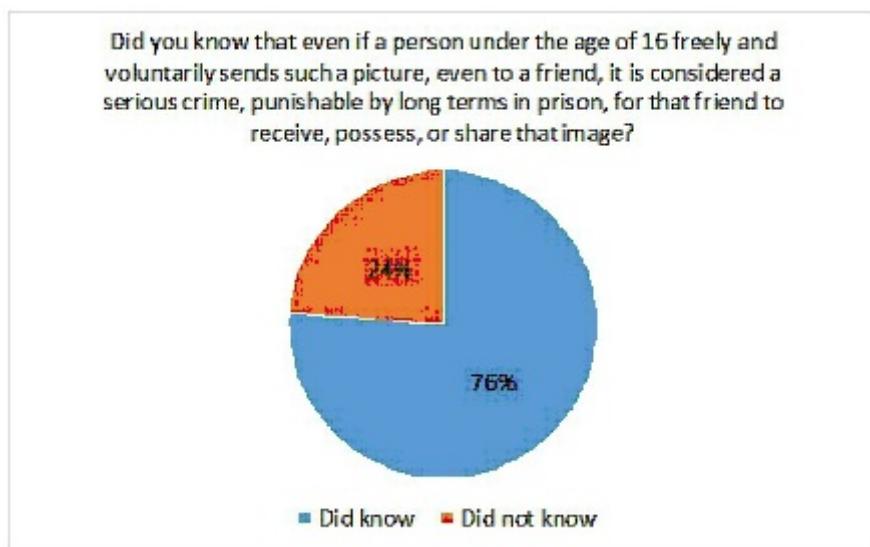
To the general question of whether even intelligent people with ASD can be left unaware of social taboos, 73% agreed or strongly agreed, with most of them strongly agreeing.

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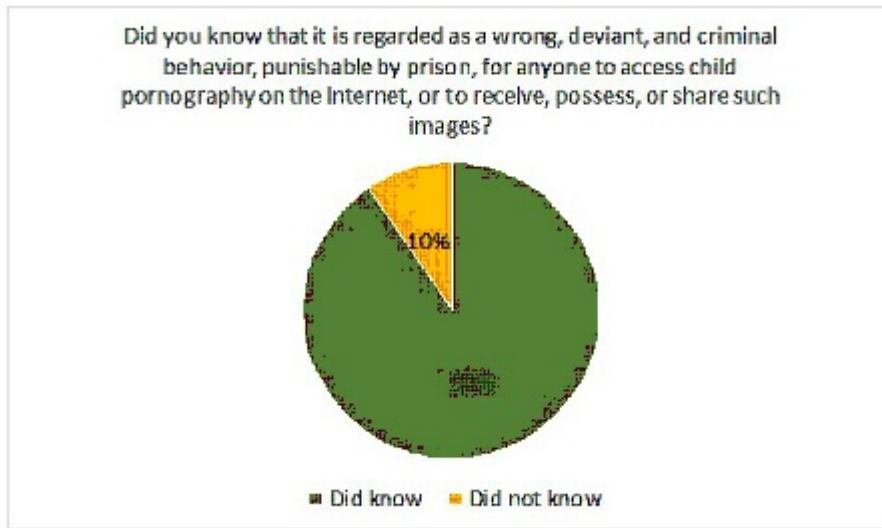
<sup>52</sup>Healthcare, Chemistry research and development, Network engineering, Management Accounting, Copy editor, Data Scientist, attorney, interfaith minister, Educator, Psychology researcher, university math professor, Foreman, Professor, Full-time museum docent, Stock trader, Digital Marketing, Gunsmith, Software Developer, Video Editor, Bank reconciliations and supervising cashiering operations in New York City Criminal Court, Accountant, Web developer, Data analytics, Pharmaceutical Scientist.



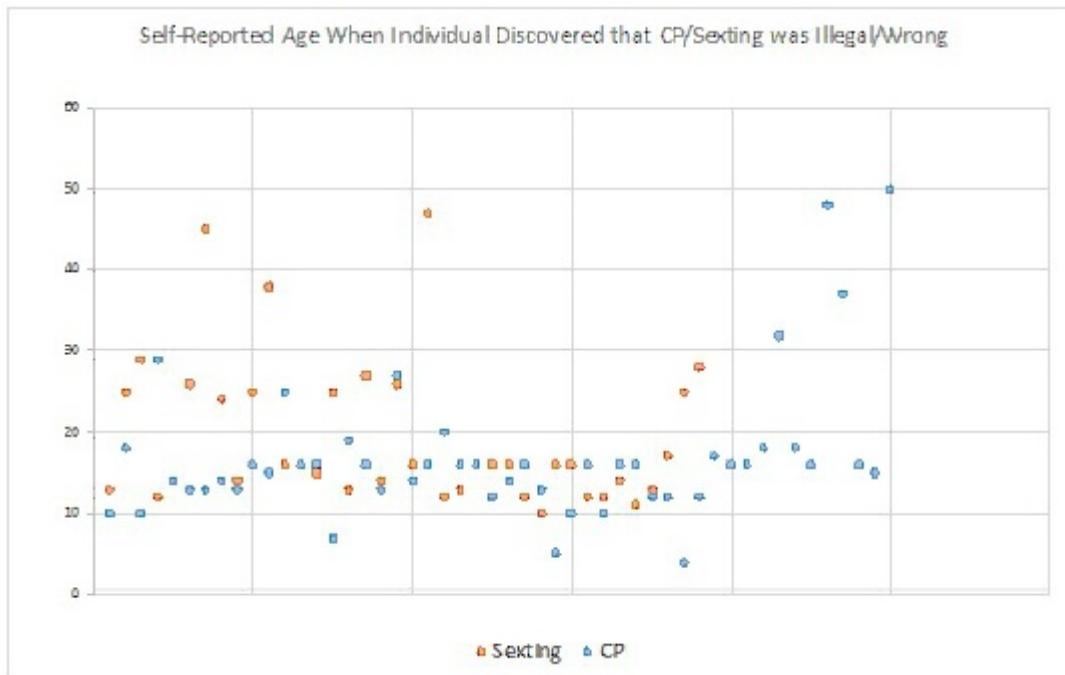
One quarter of the self-described autistic respondents, until they saw this question, did not understand the serious inappropriateness of receiving an explicit sexual photograph from an underage person. However, of the 76% who, at the time of this survey report that they were aware of this taboo, many of them did not know this until much later than adolescence, when they are typically developed peers would have understood this. This is illustrated below.



10% of the male respondents with ASD admitted they were not aware of the strong social taboo against viewing child pornography or the harsh criminal prohibition of such conduct. Of course this is based on a self-report, and so it is certainly conservative number. Here again, many of those who stated they did understand this taboo at the time of responding to the questionnaire, acknowledge that they learned this substantially later than their typically developed peers.



Thturn that the mother of chart combines the age or realization responses for both a sexting scenario involving a minor, and the question of viewing of child pornography. Obviously some of these responses are very aspirational when they report responses in the pre-teen age bracket. Nevertheless, the significance overall is the percentage of those with ASD who do not appreciate the strong taboos until into their 20s or later. Our point is not that all persons with ASD do not appreciate all taboos, but that those with the most severe social learning impediments are at risk of not understanding them.



## **ASD is Not Associated With Sexual Perversion**

There is nothing inherent in ASD that correlates it with sexual deviance of any kind. Though “persons with ASD are sexual beings, [their] individual interest in sex or in developing an intimate sexual relationship with another person varies widely across individuals at all ability levels.”<sup>53</sup> ASD is not associated with pedophilia or any other paraphilia. In fact, those with ASD are much more likely to be victims rather than victimizers.<sup>54</sup> Even if a young man with ASD were erotically interested in “underage” females, he is very unlikely to be involved in any actual offense against a child. As Dr. Kleinmann claims, “having this disorder actually makes improper sexual behavior less likely because individuals with Asperger’s Disorder [i.e. ASD] are not charismatic and are perceived, even by children, as different and bizarre,” and thus, unlikely to entice children even if so inclined. *State v. Burr*, 921 A.2d 1135, 1142 (N.J. 2008).

### **A. ASD and Sexuality**

Young men with ASD are often severely naive sexually, and sorely lacking in sociosexual information.

Individuals with ASD tend to have delayed social maturity than their neurotypical peers. Peterson et al. (2007) compared social maturity levels among 16 neurotypicals and 27 children with ASD aged four to 12 and revealed that those with ASD had lower social maturity

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<sup>53</sup> Gerhardt, Peter F., “Sexuality & Sexuality Instruction with Learners with Autism Spectrum Disorders and Other Developmental Disabilities,” THE ORGANIZATION FOR AUTISM RESEARCH, at 3.

<sup>54</sup> Examples of cases where the AS individual was a victim rather than a victimizer include *People v. Abercrombie*, 161 Cal. App. 4th 68 (Cal. Ct. App. 2008); *People v. Walker*, 2005 WL 2143952 (Cal. Ct. App. 2005); *State v. D.M.*, 958 So. 2d 77 (La. Ct. App. 2007); *In re Santini*, 2008 WL 2068288 (Mich. Ct. App. 2008); *State v. Brown*, 2008 WL 2587050 (Ohio Ct. App. 2008); and *State v. Hofmann*, 2004 WL 2848938 (Ohio Ct. App. 2004).

levels than their neurotypical peers, even among the four-year-olds, who are just learning peer interactions. Social immaturity may have a negative effect on social and emotional well-being when individuals enter puberty, and begin to learn about sex and relationships. Decreased well-being may result in social rejection and isolation that reduce opportunities to obtain sexual knowledge from peers (Brown-Lavoie et al., 2014). Studies that compared the sexual knowledge among those with ASD and neurotypicals revealed that those with ASD had less sexual knowledge, and received less sexual education from social sources (parents, teachers) and more from non-social sources (television, internet) (Mehzabin and Stokes, 2011; Brown-Lavoie et al., 2014; Ousley and Mesibov, 1991). This can result in inappropriate behavior with regard to courtship and dating since they do not have peers to teach them or to share their experiences with.

Mogavero, M., "Autism, sexual offending, and the criminal justice system", *J. INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR*, Vol. 7 Iss 3 pp. 116 - 126, 118 (2016). Of course these are studies of those with ASD in

Researchers have found that teens with ASD, typically delayed to at least half their chronological age in their sexual and social-emotional maturity but right on schedule with puberty, often engage in behavior perceived to be inappropriate (such as touching others, touching their own private body parts in public, and publicly talking about sex in ways that are inappropriate compared to the ways their peers talk about sex) because of their social skills deficit.<sup>55</sup> ASD experts suggest that parents

not just broach the subject of sexuality with your child but also to revisit it periodically to ensure that your child thoroughly comprehends the social rules surrounding sexuality . . . . In a worst-case scenario, misunderstandings in this area could lead to individuals with AS-HFA becoming either unwitting sexual offenders or vulnerable to sexual victimization.<sup>56</sup>

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<sup>55</sup> Ashley, Susan, *The Asperger's Answer Book: the Top 300 Questions Parents Ask*, at 257. (Illinois: Sourcebooks, 2007)

<sup>56</sup> Mesibov et al., *supra* note ?, at 225.

What gets young adults with ASD into legal trouble is not abnormal sexual desires, but their tendency to express or pursue normal interests in a manner outside social conventions. In fact, once social and legal rules governing sexual conduct and interests are explicitly explained to the individual with ASD, this problem is generally solved. This is the reason why many clinicians and advocacy groups conduct sexual education and socialization training.<sup>57</sup> While observing social norms does not come intuitively, they can learn this as well, with appropriate cognitive behavior therapy. [insert paragraph about age discordant sex play here]

### **Age discordant sex play**

Presence of a developmental disability requires evaluating sexual contact with familiar minors from a different perspective. Child sexual experimentation, beginning as early as toddler-age, is a normal part of sexual development. As children learn about their bodies and observe sexual behaviors, they experiment with their own bodies and are curious about those around them and may experiment with each other.

Up to 85%, children have engaged in some sort of childhood sexual play experience where the level of physical involvement was related to perceptions of normality, if not for sexual pleasure. Results differ with different methodologies. In one study 82.5% of the respondents had sexual experiences with another child that entailed kissing and cuddling, showing and touching of genitalia, and looking at pornographic videos.

While there is much research on the greater sexual victimization of the developmentally disabled child, there is nothing on their "normal" sexual development stages in childhood. So, we see no studies focusing on the prevalence, characteristics or age of sexual experimentation. Unfortunately, adolescents with disabilities are often deliberately excluded from studies of adolescent sexuality.

In a small percentage of cases arising from online activities there are examples of young men with autism having sexual contact with younger siblings or cousins just like what one would see in child-on-child sexual play. Typically the sibling or cousin might be four to five years younger and well aware of the social deficits and awkwardness of their older relative, and accustomed to his easier engagement with them as opposed to his inability to associate with his age peers. This

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<sup>57</sup>Debbaudt, Dennis, "Beyond Guilt or Innocence." ahaNY.org (available at, <http://www.aha-as-pdd.org/Debbaudt.htm>, last accessed 08/15/18).

includes same sex or opposite sex contact that is episodic and not forced. Of course in all these cases, though older, the individual with ASD is far more socially immature than their younger relative.

Young adults with ASD are typically delayed five years in their development and can often engage in behavior seen as inappropriate, including touching others. Because of the inherent deficit in social skills, often these behaviors are engaged with younger children who are seen as peers by the individual with ASD. (Ashley, 2007). Accordingly, clinicians warn parents of teens with ASD to repeatedly educate their child about inappropriate touching in order to avoid "becoming either a unwitting sexual offender or vulnerable to sexual victimization" (Mesibov, Shea & Adams, 2001).

These encounters are categorized as "age discordant sexual play," and not "molestation" because when this experience ends, there is no more experience with younger minors, or, very often, anyone else, thereafter. In other words, this behavior does not represent the beginning of a pattern of seeking out sexual or romantic experiences with minors, which might typically be validated by polygraph testing.

"Age discordant sex play" is familiar in the sexual therapy literature. The Arc advises that "Sex Offenses by a person with I/DD are often not the result of

sexual deviance. . . . Often, sex offenses are the result of counterfeit deviance" and "ignorance of what is considered appropriate," and that persons with developmental disabilities "may engage in acceptable sexual behaviors but with someone who is not an appropriate age—this is called 'age discordant sex play'."

## **B. ASD and Pornography**

Those with ASD often lack the appropriate skills and knowledge to initiate romantic relationships successfully.<sup>58</sup> With no friends, and largely misunderstood by others, they often turn to the computer.<sup>59</sup> Individuals with ASD tend to have the technical skills for computer use, to which they gravitate because computers are predictable and logical, unlike social interactions. But there are

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<sup>58</sup> Stokes, Mark and Naomi Newton and Archana Kaur, "Stalking, and Social Romantic Functioning Among Adolescents with Autism Spectrum Disorder." 37 J AUTISM DEV DISORD 169 (2007), at 1969.

<sup>59</sup> Tantam, *supra* note 3, at 147.

still risks with going online. The autistic teen or young adult’s “interest in pornography can be a way of trying to understand about relationships and sexuality.”<sup>60</sup> The desire for such material oftentimes becoming excessive and compulsive, as are most activities and interests of those with ASD.<sup>61</sup> The internet can have a damaging effect on in-person sexual encounters. As a result, the misunderstood and isolated ASD young adult who has no schooling on this material and acts accordingly “can be labeled a pervert or sexual deviant, and face the possibility of charges of sexual assault.”<sup>62</sup>

### *1. ASD and child pornography*

Inevitably, viewing online pornography can lead some autistic individuals to discover to child pornography.<sup>63</sup> Unfortunately, most parents would not think to discuss child pornography with their developmentally disabled teen. While erotic interest in underage females (at least post-pre-pubertal)

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<sup>60</sup> Tantam, Attwood, *supra* note ?, at 88 and 93.

<sup>61</sup> Tantam found men with AS may become addicted to adult internet sites, and a few have attracted police attention by downloading pictures of children. Young adolescents with AS may relate better to younger children than they do to their peers, and may occasionally make inappropriate sexual approaches to them. Tantam believes older adolescents and adults with AS may idealize childhood, and may be sexually attracted images of children for that reason. Tantam, *supra* note 3, at 161. In *United States v. Kamen*, 491 F.Supp.2d 142, 146-147 (D. Mass. 2007), however, the defendant with AS convicted of knowing receipt of child pornography contended that though he did lag behind in social maturity, he was not in fact attracted to young children. A battery of psychological tests indeed showed sexual interest in adult, mature males and females, but no sexual interest in children.

<sup>62</sup> Attwood at 337.

<sup>63</sup>Because the *mens rea* for possession of child pornography is so minimal (“knowingly”), there is no requirement that the person either know that the conduct is “wrong” or that it is illegal. Thus, these realities, about the naivete of the autistic possessor of child pornography, do not undercut the “acceptance of responsibility” for the offense.

is considered normal by psychologists, young adults with ASD might be more interested in looking at younger teens because of their social and emotional immaturity.<sup>64</sup>

## **The “Internet Effect” – the interactive online behavior at issue**

In order to understand Michael Sutherin’s behaviors, it is necessary to understand the Internet context in it happened. Michael is not like his peers in this environment. While those with ASD gravitate to the internet and social media, because it allows them a kind of social existence where their deficits are not so evident, this does not mean that “Theory of Mind” skills are less important in this context, or that deficits in this area are less consequential. Even though the person with ASD is able to focus on just text, when texting or chatting in text online, and can take time to think about what the other person means or how to express his own intentions, this does not mean he is understanding what is actually happening. Understanding still depends on what is meant or indicated “between the lines” in the text. For typically developed individuals there is a correlation between an individual’s “face-to-face” interpersonal social skills and their ability to effectively reciprocate meaning in text-based communications.<sup>65</sup> So there is no reason to expect those with ASD to have a greater skill at “reading between the lines” of text than they are at “reading” personal encounters or social situations. Their literal and concrete reading of words and text is just as debilitating in that environment as the failure to perceive the nonverbal cues in live encounters. Ultimately, Michael is just like many of the underage peers he communicated with. They were all generally seeking sexual internet experiences. However, though the underage individuals were victims in this case, they were, in many obvious ways, more mature than he was.

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<sup>64</sup>As noted previously, this is highly plausible, but not empirically established. Nonetheless, this interest is hardly deviant.

<sup>65</sup>David Engel, Anita Williams Woolley, Lisa X. Jing, Christopher F. Chabris, and Thomas W. Malone, “Reading the Mind in the Eyes or Reading between the Lines? Theory of Mind Predicts Collective Intelligence Equally Well Online and Face-To-Face,” PLoS One. 2014; 9(12).

## A. Teenagers, Sex, and the Internet

Today's teenagers have never known a world without the internet. A national survey examining media usage among children and teenagers between 8 and 18 years of age determined that this age group spends an average of 7.63 hours per day using entertainment media (e.g., computers, smartphones, electronic devices, television, etc.), with 11-14 year olds and 15-18 year olds spending 11.88 hours and 11.38 hours, respectively, per day.<sup>66</sup>

More often than not, parents are less adept than their children at using the internet, social media platforms, and the newest technology. As a result, parents are unable to properly supervise the online presence of their teenagers as they begin to develop and explore their sexuality.<sup>67</sup> For these teenagers, internet connectivity provides an open marketplace where they can find and exchange sexually explicit photos, videos, and text messages, using social media, cell phone apps, and websites. Sexting (sending a sexually explicit text or nude photo via text message) plays a big role in today's internet-savvy teenagers.<sup>68</sup> For them, sexting is ubiquitous, and it does not carry the same stigma as it does for their parents. In fact, one study found that twenty-two percent of teenagers think that sending nude photos to others is not a "big deal."<sup>69</sup> Sexting, and online sexual activity more generally, has become a common and normal part of adolescent psychosexual development. It is from this experience that many children with ASD can learn the "social scripts" they might later use when they are participating in chat rooms or texting or sexting, without really understanding the social connotations of implications of this borrowed language.

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<sup>66</sup>Shin Ruu Ko, "Online Experiences of Adolescents with Asperger's Syndrome and High-Functioning Autism," ProQuest LLC, UMI Dissertation Publishing Number 3680942, 1-2 (2014).

<sup>67</sup>Adriana G. McEachern, Renee T. McEachern-Ciattoni, & Filomena Martin, *Sexting: New Challenges for Schools and Professional School Counselors*, 10 (20) Journal of School Counseling 1, 16 (2012).

<sup>68</sup>*Id* at 11.

<sup>69</sup>*Id.*

Cybersex is another online interaction between two or more people who exchange sexually explicit message, photos, or video footage for the purpose of self-gratification.<sup>70</sup> Cybersex is therefore akin to sexting except that it is not restricted to a single platform, i.e. text messages. Cybersex can occur through public and private online chatrooms, online video games, email, cellphone applications, telecommunication programs, and, as here, through online fandom roleplay. As the popularity of roleplay rises, so do sexual interactions, whether wanted or unwanted, on roleplaying sites. A variety of sexual roleplaying categories emerge, as well, such as ageplay. Ageplay involves one or more individuals pretending to be an age other than his or her own for the sexual satisfaction of one or more of the parties involved.<sup>71</sup> Inappropriate and unacceptable behaviors, such as the exchange of sexually explicit messages or materials on roleplaying sites have increased to the point that several anonymous communities have been created for the sole purpose of complaining about these participants, i.e. Wankgate, Fandom Wank, and RP Secrets.<sup>72</sup>

Those with ASD will inevitably engage in sexting and other online activity in the same way that others do, but with significantly less understanding than their neurotypical peers, as to the risks of this behavior, or the appropriateness of it under different circumstances.<sup>73</sup>

### *1. The Online Disinhibition Effect*

People say and do things on the internet that they would not ordinarily say or do. This is even more true with those with ASD who can adopt patterns in speaking or behaviors online that are completely inconsistent with their personalities. This is what is called the Online Disinhibition Effect. The Online Disinhibition Effect creates the sense of an anonymous environment where “anything goes” and if trouble does arise, it is easy to escape.

### *2. Online Role-Play*

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<sup>70</sup> Cybersex, available at <https://en.wikipedia.org/wiki/Cybersex> (last visited April 27, 2018).

<sup>71</sup> Ageplay, available at <https://en.wikipedia.org/wiki/Ageplay> (last visited April 27, 2018).

<sup>72</sup> Chen at 2.

<sup>73</sup> Ko at 52.

Online roleplay is where a person adopts an online alter ego or character in order to interact with others in a game setting.<sup>74</sup> Players can be drawn in emotionally because the game is largely based on developing relationships between characters. Not surprisingly, these emotionally laden roleplaying relationships can often become sexually charged. In such instances, roleplaying merges with what is known as cybersex.

One study by Finnish researchers confirmed that the adolescents engaged in sexual roleplay have a very different experience from what parents might fear.<sup>75</sup> The study found that, although 1 in 5 Finnish teenagers between the ages of 11 and 16 received messages relating to sex, those teenagers did not experience those sexual messages as upsetting, distressing or harmful.<sup>76</sup> The adolescent girls surveyed for this study described receiving sexual message as “unpleasant or distressing” only 30% of the time.<sup>77</sup> The remainder found sexual messages to be no cause for concern. One participant in the study wrote the following: “[p]laying role-games where sex scenes have occurred have been voluntary and the players have known each other fairly well. I think its harmless exploration of sexuality and release in writing, and I haven’t heard anyone being upset about the games.”<sup>78</sup> Another wrote “[m]essages in role-playing games have been very detailed and realistic but not disturbing. Some might consider the messages crude or lewd but I think it’s a matter of attitude.”<sup>79</sup>

This Finnish study also found that role-playing games were the most frequently mentioned (and defended) form of exchange of sexual messages among teenage girls.<sup>80</sup> Forty-three percent of

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<sup>74</sup> Xanira Chen, *Seeking Intimacy in Fantasy: The Effects of Social Anxiety on Cyberstalking Behavior in Fandom Roleplay*, ProQuest LLC, UMI Dissertation Publishing Number 3665123, 2 (2014).

<sup>75</sup> Silja Nielsen, Susanna Paasonen, & Sanna Spisak, ‘Pervy Role-play and Such:’ Girls’ Experiences of Sexual Messaging Online, 15(5) Sexual Education 472 (2015).

<sup>76</sup> *Id.*

<sup>77</sup> *Id* at 475.

<sup>78</sup> *Id.* at 474.

<sup>79</sup> *Id.* at 476.

<sup>80</sup> *Id.* at 466.

the respondents had engaged in sexual role-playing games, and they did not see themselves as victims in those games.<sup>81</sup> Instead, the adolescent girls surveyed described themselves as active participants choosing to explore their own sexuality on their own terms:

Survey findings make evident that Finnish teenage girls are aware of both the risks and possibilities related to sexual messaging, and that they define themselves as sexual subjects who knowingly explore their agency. Their messaging practices offer tangible challenges to fear-based sex education discourses that frame girls solely as victims of grooming and harmful conduct online. Respondents describe themselves as active and reflexive agents when describing how sexual messaging feels and how they make sense of it in relation to their knowledge and understanding of online communication more generally.<sup>82</sup>

## **B. Michael Sutherin’s Online Behavior**

The case involving Michael began in late February 2019, when an FBI Confidential Human Source (“CHS”) provided information to an FBI agent that an Instagram user, “SuperSmashCandy,” was using sexually charged language with an underage female user in Texas.<sup>83</sup> The FBI connected the SuperSmashCandy account to Michael and began investigating the nature of his communication with minor females.<sup>84</sup>

Michael had been using Instagram and Kik to communicate with young female internet users, and the conversations were generally sexually oriented. As is typical of people with ASD, Michael’s conversations are defined by language and interactions that are characteristically formulaic, rigid, and repetitive. Generally, Michael’s communicative roadmap with other correspondents begins with a brief introduction, typical back-and-forth, questions about age, and usually culminates with questions about their interest in sex, specifically anal sex, and whether these other users have any pictures that they are willing to send him.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 480.

<sup>83</sup> Compl. at 3

<sup>84</sup> *Id.* at 5

While the language that Michael has used is graphic and potentially shocking from an individual perspective, it must be taken in totality to truly understand. Michael's characteristic solicitation of pictures from these users is explained by his developmental disability. Given what we know of Autism and its manifestations in social behavior, Michael's grasp of what is socially acceptable is far from developed; he essentially believes that these interactions are not truly real, at least from the perspective of day-to-day, real-life social interactions. For him, given his mental age, communicating with these internet users was simply a role he was taking on, with no true thought as to the implications of his actions.

We learn from this record the accuracy of the research about the existence of explicit sexual role play, and sexual approaches, even among very young persons on the internet. We see approaches and interaction by young girls that clearly represent the effects of the internet disinhibiting them. Clearly most, if not all, of them were experienced in doing this with perceived peers.

This is not to blame the victims for participating. The point is that, disinhibited by the effects of the internet, the reciprocal conduct of these correspondents send a message of permission, and acceptance and tolerance for his approach. While they know that this approach is not appropriate "offline," Michael does not. Michael comes in without inhibitions gleaned from a perception of the social world, with interests and desires and seeking validation in through conversations online. This is not from an understanding of the sociosexual rules related to age difference, but through trial and error. The persistence of those with ASD in pursuing something of interest assures that he would have quickly learned that he would not have success if he used his actual age. But this does not communicate exactly *why* that works for them – or show that he had any understanding of what their actual perspective was.

It is clear from the exchanges that Michael, though older chronologically, is just trying to participate in an existing dis-inhibited and sexualized social realm that these adolescents are well familiar with. The big difference is that they understand it far better than he does.

## **Prison Experience of ASD Individuals**

Michael's parents spent many years trying to help their disabled son navigate the social world and protect him from people and institutions that do not understand his disability. They fear the possibility that he will be sentenced to prison, when they might no longer be able to provide their son this much-needed guidance and support in one of the most

challenging and dangerous environments he is ever likely to encounter. While federal and state statutes require state agencies to accommodate those with disabilities, jails and prisons fall particularly short when it comes to accommodating those who are developmentally disabled. Michael will be no exception.

The same lack of understanding of social situations and difficulty of perceiving the feelings and intentions of others, which counsel feels is the major cause of the complaint in this case, pose even greater problems in figuring out the norms and expectations of inmate society and prison custodians. For young men with disabilities, bullying and victimization is to be expected in general society; in prison, it is inevitable. Though statistics vary, reported instances of bullying among ASD individuals in the general population ranges from 29% to 94%. Lawrence A. Dubin *et al.*, Caught in the Web of the Criminal Justice System: Autism, Other Developmental Disabilities, and Non-contact Sex Offenses 49 (Jessica Kingsley, 2017). *Id.* Environmental stimuli which can be unbearable in routine life (sounds, light, smells, and textures) can be excruciatingly amplified in the prison environment. For those with anxiety and depression, which frequently accompany the diagnosis of ASD, confinement is the opposite of a therapeutic setting and will invariably worsen their already highly vulnerable mental and emotional states.

Additionally, traits typical of those with ASD can be problematic and even life-threatening in confinement. For example, rigid reliance on formalistic rules, which often provide guidance for these men in otherwise uncomfortable situations, compel ASD inmates to "snitch" on fellow inmates for rule violations. *See Generally*, Simon Baron Cohen, "Mindblindness: an Essay on Autism and Theory of Mind" (1995). These disclosures precipitate a greater degree of "bullying, exploitation, social isolation, and altercations with other inmates." Clare S. Allely, *Autism Spectrum Disorders in the Criminal Justice System: Police Interviewing, the Courtroom, and the Prison Environment*, SMGROUP, Oct. 2015, at 7.

Imprisoned ASD individuals are also at an even greater risk of physical and sexual victimization than their neurotypical peers. *Id.* at 8. This abuse is only exacerbated by the fact that prison staff fail to understand, support, or empathize with these men. *Id.* Prison employees who are not used to working with an autistic population on a daily basis will have

no time or tolerance to deal with their unique idiosyncrasies. The rigidity of individuals with ASD and their dependence on rules and routines makes any disruption of routines, and change in circumstances, a very distressing experience. Being taken into custody is traumatic for that reason alone.

The hypersensitivity of these individuals to sounds, light, and touch accentuate the difficulty they have learning from social experiences and fitting in with the world around them, whether it is at school, work, or a jail environment. The resulting alienation is the cause of many problems. For the vast majority of them, prison in particular is torture for torture's sake. There are no benefits except lost time which could otherwise be engaged in meaningful therapy to help address the underlying problems.

A recent article in The Journal of the American Academy of Psychiatry and the Law highlights the failure of the correctional system to address the needs of this population, and the improper use of solitary confinement as an answer. Isabella Michna & Robert Trestman, Correctional Management and Treatment of Autism Spectrum Disorder, *J. AM. ACAD. PSYCHIATRY L.*, 253, 258 (2016).

An individual with ASD often interacts with correctional staff and other inmates differently than do neurotypical individuals. For instance, persons with ASD are highly suggestible and quick to rationalize their behavior. Their presentation may lack the expected sense of guilt or remorse one would typically expect. Persons with ASD struggle at reading another's face and easily become confused by others. Their tendency to avoid eye contact may be perceived as disinterest or guilt. They may overcompensate with a fixed stare that may be perceived as aggressive. During an interview, persons with ASD may interpret what is being said to them literally and not understand hidden meanings, metaphor, or sarcasm. These behaviors, if not recognized as such by staff or other inmates, put individuals with ASD at risk for serious consequences.

*Id.* The authors warn: "For individuals with ASD who become incarcerated, the failure to provide necessary supports is potentially devastating." *Id.*

A further backdrop to this is the decision very recently by Lord Chief Justice Burnett and Justice Eiseley of the High Court of Justice in England to refuse the United States'

request for the extradition of Lauri Love on computer “hacking” offenses. The decision was out of concern for the demonstrated inability of the Bureau of Prisons to properly care for or protect those with Asperger’s Syndrome which would result in “oppressive” treatment. An excerpt of the decision is attached as **Exhibit F**.

Since being held inside of the Delaware County Jail since early May of 2019, Michael has been, and continues to be, regularly threatened and physically assaulted by other inmates. Though terrible for Michael, this should come as no surprise. As a result of their dispositions, people with ASD are particularly susceptible to rampant bullying and intimidation. In jail, within the nuanced social order that inevitably defines daily life in correctional facilities in the United States, this has resulted in other inmates routinely stealing from, extorting, threatening, and beating Michael.

Michael is living in constant fear of the other inmates. Coupled with his aversion to external stimuli that – as a result of his disorder – manifests in serious anxiety and depression, he is struggling to survive. Michael’s autism defines him to others, and there is nothing he can do to mask his condition while in the holding center. As such, he has become the easiest of targets. Bullying is commonplace in jail, and for Michael, it is inescapable. Inmates have thrown garbage into his cell, forced him to use corrosive chemical cleaners with his bare hands, and continue to extort him for money that his parents provide. Items that Michael purchases from the commissary, like clothing and toothpaste, are recurrently stolen from him. Furthermore, he is forced to tolerate inmates who deliberately burp and pass gas on him. However, this bullying, while unacceptable on its own, has escalated to something more sinister.

Michael has been made to endure penises and the term “Mega Dick” forcibly drawn on his body by other inmates, been sprayed in the face with chemical solvents, received graphic and sexually-charged drawings of his own penis from other inmates, has been propositioned by other inmates, and is suffering from repeated and violent physical attacks by other inmates on a near daily basis. During one incident, Michael’s head was slammed into a wall, and he suffered a deep laceration. He’s reportedly been kicked, slapped, punched, and has been beaten on his crotch and anus. On several occasions, another inmate has unsuccessfully attempted to sodomize Michael with a broom handle.

Fearing retribution, Michael does not report these assaults. He has stated that various gangs inside the facility have spoken of hurting him because of his charges. When visiting Michael each week, his parents have noticed new bruises and wounds where Michael has been beaten by other prisoners. He has refused medical treatment, and the correctional officers cannot, or will not, do anything to prevent these assaults from happening. Most disturbingly, there are inmates who have been informed about his charges, and a number of them have encouraged Michael to take a “swan dive,” a thinly veiled expression meant to persuade Michael into committing suicide.

The agony that Michael has had to live through for the past seven months has been enough for him to periodically be shuffled around the facility and placed in administrative segregation, where, purportedly for his own protection, he is locked in a cell for twenty-three hours each day, with minimal human contact. Administrative segregation is typically a form of punishment for violent or disruptive behavior. Even for a person without an impairment like autism, this treatment is akin to torture. Severe isolation causes anxiety, depression, mental illness, and panic. Aside from the inevitably brutal treatment by the other inmates, Michael’s autism makes him especially sensitive to external stimuli, and as such, despite the constant abuse, his confinement has taken an exceptional toll on him.

Arguably, the negative experiences of the jail environment are reported by all prisoners. However, these experiences have a potentially greater detrimental impact on individuals with autism compared to individuals without this diagnosis. Hypersensitivity issues can accompany ASD. For example, many people who are on the autism spectrum are hyper-sensitive to bright lights or certain light wavelengths (e.g. from fluorescent lighting). Many find certain sounds, smells, and tastes overwhelming. Certain types of touch (light or deep) can feel extremely uncomfortable. The sensitivities that many individuals with autism experience may be compounded in the prison environment. Generally speaking, people with autism are more sensitive to tactile sensory stimuli than people who are not autistic. Michael is no exception.

The way Michael experiences sounds and smells is not the same as how a person without autism experiences them. The noises in jail, like the screaming, the banging doors, the noxious odors from the cell toilets, and the ultra-bright lighting may seem like simple

annoyances to a regular person, but to Michael, they are completely overwhelming. Prisoners shout to each other, cell doors slam open and closed, there is a constant smell of cleaning products, and there is minimal natural light. Michael's basic needs, like laundered clothing and adequate plumbing, are often not met. His cell is dirty and he is prevented by the guards from keeping it clean, ventilation is poor, and the toilet frequently does not work. Resultantly, Michael's jail environment has lead to the development of a wider range of negative symptoms, including his social withdrawal and sensory abnormalities that drive his anxiety, depression, and thoughts of suicide. There is nowhere Michael can escape to.

Similarly, food overlaps with many aspects of life that significantly challenge the coping skills of individuals with autism. These can include extreme sensitivity to change and sensory stimuli, as well as an intense focus on texture and strong tastes. While we all have food preferences and most of us find some semblance of comfort in food, these natural tendencies can become exaggerated for a person with autism. In other words, Michael's experience with food in jail – like his other reactions to external stimuli – are particularly intense. Notwithstanding the objective alarm Michael experienced upon discovering maggots in his food, his senses can be provoked very quickly as a result of how his autism has shaped his eating habits.

Ultimately, Michael's autism makes him increasingly at risk to being bullied, manipulated, exploited, and sexually abused. Negotiating the hierarchy of the holding center is extraordinarily complex and difficult for Michael. It's not going to get any easier for him. Between his reactions to the jail conditions and his difficulty in interpreting social situations, Michael is at the peak of his vulnerability. He is suffering. His numerous debilitating issues, (bullying, victimization, inability to communicate, and sensory processing issues), will become all the more acute if he is placed inside an unforgiving and insensitive prison setting. In the previously provided examples, each of these men experienced the same difficulties throughout their lives that Michael has. Those difficulties only became exponentially worse when they were incarcerated.

Unfortunately, our expectations are no higher in the Bureau of Prisons, where accommodating people with disabilities has been a struggle for many families and only achieved by those few who could afford to bring disabilities litigation against the Bureau of

Prisons or were beneficiaries of class actions brought by disability rights or human rights organizations. In a statement given to the district court in *U.S. v. Tanner* 16-cr-00061, (ND Tex), Maureen Baird, former Warden at FCI Danbury, MCC in New York City, and USP Marion, told the judge that there has never been training in the BOP for dealing with persons with autism (despite 40 hours of training required for every staff member each year), and that not once in all her 28 years of training and experience had she even heard the word "autism."<sup>85</sup>

## **Treatment**

One of our principal purposes in providing the Court with such extensive information about Michael and his disability is to encourage the Court to tailor conditions of post-release supervision to Michael's specific needs as a person with ASD, rather than taking the "one-size-fits-all" default conditions of supervised release, which reflexively call for a standardized "sex offender treatment program." There is consensus among those with experience treating individuals like Michael that such programs are not suitable and do more harm than good.

Michael's underlying problem is not like that of typical sex offenders. He is not antisocial. He does not have the kind of learned behaviors that needs to be "unlearned." He did not rationalize his behavior using "cognitive distortions." He does not need "rehabilitation," he needs "habilitation." Specifically, because of his ASD and his extreme socio-sexual ignorance, he requires therapy that is directed to compensate for his lack of intuitive social learning by providing explicit socio-sexual education.

In traditional sex offender treatment programs, there is focus on development of empathy for victims. This is designed for individuals who know very well the physical and psychological impact of sexual aggression on victims, but care little about it. This is the technique suitable to the person with anti-social features. The anti-social person is not only aware of the feelings and fears of the other person, they readily take advantage of these feelings and fears to manipulate the other person. They lack "emotional empathy."

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<sup>85</sup>This was in a video prepared by the defense for the judge in reference to sentencing.

Individuals with ASD are completely the opposite. Because of their condition, their brain simply does not pick up on the feelings of others, so they lack “cognitive empathy.” If they are taught how to pick up on the true feelings of others, or if that is explained to them, they are then very concerned about the consequences of their actions on other persons. Thus, in terms of empathy, those with ASD are the exact opposite of persons with antisocial features. In both there are “empathy deficits” but both have a completely different origin, and completely opposite effect. Those with ASD are also genetically different from those of antisocial features; both antisocial traits and autism traits originate genetically, but in distinctly different groups. Moreover, they are neurologically distinct because different parts of the brain show cortical differences in persons with autism, as opposed to those with antisocial features.<sup>86</sup> In every study that has been done regarding the risk of re-offense by sex offenders in general, or child pornography offenders specifically, the chief factor pointing to a risk of reoffending is the presence of antisocial traits. That is manifestly not the case here.

Moreover, traditional sex offender treatment program will not be effective for Michael because individuals with ASD learn information differently than neurotypical individuals.

## A. Treatment recommendations for Michael

### 1. *Comparison of Treatment Programs*

In a traditional sex offender treatment program, Michael would be grouped with actual pedophiles or sexually deviant or aggressive persons. The common theme of treatment in traditional sex offender treatment programs involves challenges to the distorted thoughts and justifications individuals put forth for their sexually deviant behavior. Group sex offender

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<sup>86</sup>Wallace, Lee, Clasen, et al. (2012). Distinct Cortical Correlates of Autistic versus Antisocial Traits in a Longitudinal Sample of Typically Developing Youth. *The Journal of Neuroscience* 32(14): 4856-60.

therapy seeks to facilitate an individual's relearning of appropriate sexual behaviors and rehabilitation of deviant thoughts, often involving pressure from other group members. There is also a requirement for group participation, which involves speaking in front of fellow group members and challenging the statements made by group members-things that Michael is very uncomfortable doing or incapable of doing.

In contrast, an individual with ASD requires an individualized assessment of how he sees the world and an assessment of what he needs to avoid the dangers that are ever present for an individual with ASD rather than group treatment. For an individual with ASD there is no deviant thought process to begin with, so there is nothing to relearn or rehabilitate. Materials must be presented in a concrete fashion and learned by rote, explicit directions that must be given. The lessons taught must be tailored to the individual's life situation because individuals with ASD are not good at applying abstract rules to unfamiliar situations.

Because individuals with ASD are not unable to empathize with others, and have not developed cognitive distortions in order to help them circumvent social norms which they are unaware of, aspects of traditional sex offender treatment programs that are meant to teach participants to empathize with victims and to recognize cognitive distortions are inappropriate for them and are not taught in a manner that individuals with ASD can comprehend.

Unlike many typical sex offenders, Michael is not sexually deviant. He is a person who was simply unable to discern the social opprobrium for engaging in prevalent Internet sexual behavior arising chiefly because of his age difference. This can be addressed with appropriate socio-sexual education, and could easily be provided in a non-custodial setting, whereas it will never be provided to him in a prison setting. On supervised release this could be provided as well, but it will not be provided in a traditional sex offender treatment program. He should not be placed in a traditional sex offender treatment program with pedophiles and sexual predators.

Instead, Michael needs "habilitative" treatment, using active learning and education that is very explicit and concrete. Michael's treatment must be more about individualized education that recognizes his special needs and the unique ways in which his brain functions,

rather than seeking to return his sexuality to a state of normalcy. Michael needs concrete rules and explicit instructions because once he knows the rules, he will abide by them. Because he cannot generalize across unfamiliar situations, it is very important that his treatment program is tailored to his needs and life situation. This simply cannot happen in the SOTPs that are operating now.

Clare Sarah Allely and Ann Creaby-Attwood support preventive intervention for those with this pervasive developmental disability and not treating these individuals like the typical “sex offender”:

These vulnerabilities in a sexual offender with ASD need to be recognized and appropriately addressed in treatments/intervention. Indeed, there have been some recent advancements which have recognized the clinical importance of this. For instance, in order to improve the therapeutic outcome, Sutton et al. (2013) recommend a modification to the traditional treatment protocol for offenders with ASD (which typically focuses on individual and group talk therapy) to ones which are tailored to the learning styles of the individuals (e.g. visual learning, modeling with practice and feedback) and limiting the contact that the offenders with ASD have with the sex offenders without a diagnosis of ASD.

This recognition of the need for different treatment then leads to a very important observation about *prevention*:

Deterrent programmes for individuals with ASD should attempt to bridge the gap between sexual knowledge and impaired social and ToM abilities. Intervention strategies should address the following areas: the development of sexual knowledge, modeling of socially desirable behaviours, social-skills training/retraining (which also focuses on the development of social boundaries), customary courting and dating behaviours and socially acceptable sexual behaviours in many sexual offenders with ASD (e.g. Koller, 2000).

The foregoing reaffirms the point that what individuals like Michael lack, as a result of their social learning disability and naïveté, is precisely that – knowledge about “socially acceptable sexual behaviors.”

It is important to understand that this research did not differentiate between different types of “sex offenders” with ASD. This research therefore included all kinds of sexual assault, voyeurism, stalking, as well as viewing child pornography. Child pornography would be the most problematic for those with ASD—without the benefit of typical socialization, ASD individuals have a difficult time figuring out how the moral and legal opprobrium associated with child pornography.

An very important “takeaway” from all this is the very stark divide between those with ASD and those who actually are at risk of offending against children. For the latter, no one would propose that either prevention or treatment could simply consist of providing them with explicit rules and sociosexual information. And yet, for those with ASD, for prevention and treatment, there is consensus that this, primarily, is what is required.

## **Prosecutors and judges have made extraordinary adjustments with child pornography offenders with ASD**

Appreciation of the empirical facts about the nature of ASD, and how it undercuts moral blameworthiness for such conduct, on the one hand, and counters concerns about risk of future offending, on the other hand, has led prosecutors, and judges, to support dramatic deviations from the results typical in the ordinary child pornography case. While the government has insisted on a plea that prevents departure below a mandatory minimum, this history should reinforce our position that a sentence above that delineated in the plea agreement would be, by many factors, “greater than necessary.”

We note at this point that the Sentencing Guidelines Commission, though observing that “not all child pornography offenders are pedophiles, and not all child pornography offenders engage in other sex offending,” 2012 Report, p. 73, has failed to address the likely characteristics of that population that is “Child Pornography Offender” *only*. The Commission nowhere addresses the issue of developmental disabilities which might impair the ability of the individual to appreciate the wrongfulness or illegality of such conduct, notwithstanding the near “strict liability” nature of the offense. Somewhat ironically, the discredited “Butner Report” noted that it “is indisputable that certain factors (e.g., psychiatric

disorders, developmental and psychological vulnerabilities)" may be at work in some cases, but that "the influence of these factors on child pornography offenders is unknown."<sup>87</sup>

We have been able to find a number of cases similar to Michael's that have been identified as involving both an individual diagnosed with ASD involving child pornography and also where the defense understood the concerns and made some effort to provide information as to how it affected the blameworthiness of the defendant or the risk that he would reoffend.<sup>88</sup>

*See Outcomes in Child Pornography Cases Involving Asperger's Syndrome*, attached as **Exhibit B**, which contains federal and state cases where a plea was allowed to an offense which did not trigger SORA.<sup>89</sup> There are seven cases of pretrial diversion or non-prosecution.

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<sup>87</sup> Hernandez and Bourke, "The Butner Study Redux: A report of the incidence of hands-on victimization by child pornography offenders," 24 *Journal of Family Violence* 181, 183 (2009).

<sup>88</sup> These cases were found through contacts with professionals or attorneys who have been in contact with the undersigned about this type of case. No doubt there are many cases involving ASD and child pornography charges that are not represented here and which have worse outcomes. Many defense counsel have failed to appreciate the import of the condition, or have misunderstood it, or were daunted by the sense that prosecutors would not listen to concerns about how autism may have affected their clients. One of the reasons to search out these 30 cases is to let defense counsel prosecutors and judges see that prosecutors and judges have reacted positively to accurate information about the role of Asperger's in these cases.

<sup>89</sup> The defendants with ASD pled to an obscenity charge, a felony non-sex offense, after initially being charged with a child pornography offense. *United States v. Rubino*, 07-mj-00547-JWF, 09-cr-06054-CJS (W.D.N.Y. Aug. 19, 2009); *United States v. Andolino*, 12-CR-6141-S (W.D.N.Y. May 7, 2013); *United States v. Wilson*, 12-CR-5220-H (S.D. Cal. May 6, 2015); *United States v. Peterson*, 14-cr-00505 (D.Utah Oct. 24, 2016); *United States v. Candelario*, 15-cr-00417-HEA (E.D. Mo. 2017); *United States v. Argyris*, 18-cr-00547-SHS-1 (W.D.N.Y. Aug. 1, 2019). I also note two state court cases where the equivalent result occurred. *People v. Agugliaro*, 2014-092 (Niagara Co., N.Y. Oct. 27, 2015) (N.Y. Penal Law § 263.10 - Obscenity 3rd Degree); *Commonwealth of Virginia v. DeJerolme*, CR-16-381 (Stafford Co. Nov. 2, 2016) (Va. Code Ann. § 18.2-374 - Possession of Obscene Material).

For conviction of the index offense, no additional custody was imposed in 29 of the 54 cases. Of the remaining cases in which jail was imposed, the average sentence was 54 months. On the average, the federal sentences were 82% below the bottom of the guidelines range (however, this is skewed by the fact that a number of these cases involve a mandatory 5 year minimum sentence).

In any event, these real-life results in cases where ASD was presented and considered range from little to no jail time, to charges reduced to a non-sex offender reporting offense, to complete pretrial diversion. Where probation has been involved, judges have recognized that ordinary “sex offender treatment” is not appropriate. We hasten to add that these prosecutors and judges have track records of “toughness” in prosecuting and sentencing in child pornography cases.

While the facts of all these cases may differ, the defendant’s are all pretty much the same as Michael Sutherin. The prosecutors and judges were very experienced in the handling of child pornography cases. It cannot be supposed that they were “fooled” about anything. What happened is that they let themselves be informed about the science and let their increased understanding of this phenomenon guide their decisions. None of these sentences were appealed by the prosecution. **Equally important, none of these defendants have reoffended!**<sup>90</sup>

These results validate the idea that a criminal prosecution and conviction are not essential to effectively deal with the problematic sexual behavior of the developmentally disabled. This history shows that incarceration is not the appropriate answer for these young men who already face so many challenges in life.

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<sup>90</sup>The only cases we have seen where an ASD defendant was rearrested was where the defendant was not diagnosed at the time of his first arrest and/or received no appropriate therapy for his ASD condition .

## **Sentencing Options**

Michael Sutherin is not here because he is a deviant person. He is not here because he is by nature a law breaker or an antisocial person. Michael is here because he is a developmentally disabled person who, like others with ASD, has grown up experiencing a very different world than that experienced by the police, the prosecutor, defense counsel, probation officers and the Court.

Countless people working with persons like Michael would immediately grasp the horror of exposing him to sex offender registration, a criminal conviction, or incarceration for failing to appreciate the existence or depth and cause of the social opprobrium for “sexting” with minors.” In his extreme social immaturity, and nearly complete social-sexual ignorance, with seriously impaired executive function, he joined in this sexualized Internet world, seeking social connection and sexual excitement without any culpable understanding of the serious wrongfulness and in social opprobrium for what he was doing. And we are certain that the deficits that put Michael here are deficits which can be made up for with appropriate “habilitation,” in which these social norms are taught and reinforced, protecting society and enabling him to have a life. It is our moral as well as legal obligation to ensure that persons like this are not penalized, ostracized or convicted on account of conduct that their developmental disability prevented them from understanding.

Unfortunately, given the powers allotted to prosecutors by Congress, the District Court judge has relatively little ability to see that these obligations are met in this case.

### **A. Placement, Programs**

Michael should be placed a facility where he will not be victimized and where some attention will be paid to his sensory issues. There is a lengthy track record of victimization in his current confinement. He has been beaten and taken advantage of and terrorized by other inmates who immediately grasp his social deficits. The Bureau of Prisons needs to be directed to take his disabilities into account and protect him from abuse by other inmates and corrections officers.

## **B. Prison designation recommendation**

The BOP does not screen for ASD, and it does not have any programs specifically to treat those with ASD.

However, as a result of repeated concerns expressed by judges and professionals, the Bureau of Prisons established what it calls the SKILLS program at FCI Danbury (low security) and at Coleman, Florida. The SKILLS program aims at helping intellectually and developmentally disabled inmates from being victimized by other inmates.<sup>91</sup> Other judges have insisted that defendants with ASD be designated to this program. See, *United States v. Smith*, 15-cr-00042 (E.D.Va, Ellis, J.) #233(Judgment) 02/03/17; *United States v. Tanner*, 16-cr-00061 (NDTex, Godbey, J) #59, 4/10/18 (Judgment) p. 2.

We hope that the Bureau of Prisons will eventually establish a minimum security facility that is designed to accommodate the extreme sensitivities of autistic persons and those who are intellectually and developmentally disabled, but nothing like that exists now. However to that end, since without something being done about it, Michael would not be eligible for placement in a minimum security facility, which leads to our next request to the Court.

## **C. Judicial Recommendations regarding security level**

Courts are accustomed to making recommendations to the Bureau of Prisons ("BOP") regarding programs and location of confinement. They are unfamiliar with recommendations directed specifically at the security level. Only a minimum security facility is likely in the

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<sup>91</sup>"The Skills Program is a residential treatment program designed to improve the institutional adjustment of male inmates with intellectual disabilities and social deficiencies. The program uses an integrative model which includes a modified therapeutic community, cognitive-behavioral therapies, and skills training. The goal of the program is to increase the academic achievement and adaptive behavior of cognitively impaired inmates, thereby improving their institutional adjustment and likelihood for successful community reentry."

foreseeable future to be able to provide an environment for Michael that is not torturous for him on account of his hypersensitivity.

*1. The judicial role in BOP security assessment: Program Statement 5100.08*

The Bureau of prisons invites and considers judicial recommendations not just related to what facility or region or programs to which an inmate should be designated, but also recommendations directly aimed at the assessment of security level. According to this core Program Statement, the BOP expressly considers "Any security, location or program recommendation made by the sentencing court." Chapter 1, Page 1. According to this program statement, inmates are classified based upon (1) the level of security and supervision the inmate requires and (2) the inmate's program needs.

The initial assessment of security level is done by staff at the Designation and Sentence Computation Center (DSCC), in Grand Prairie, Texas. They put information from the sentencing court, U.S. Marshals Service, U.S. Attorneys Office or other prosecuting authority and the U.S. Probation Office about the inmate into a computer database (SENTRY). SENTRY then calculates a point score for that inmate which correlates to the security level for institutions.<sup>92</sup>

We believe that Michael may be at a level above that for designation to a minimum or low-security facility.<sup>93</sup> Michael's offense is a "sex offense" which is a "Public Safety Factor" which may render him ineligible for a minimum security facility. See, 5100.08, Ch. 5, pp. 4, 8.

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<sup>92</sup>Minimum = 0-11 points; Low = 12-15 points; Medium = 16-23 points; High = 24+ points

<sup>93</sup>This calculation can be done on form BP-337 which is contained in Chapter 4 of Program Statement 5100.08; Severity5, Crim Hist, Age4, Drug1, Total12

An inmate whose behavior in the current term of confinement or prior history includes one or more of the following elements will be housed in at least a "Low security level institution, unless the PSF has been waived. . . .(2) Possession . . . of child pornography."

2. *Recommend waiver of PSF for "sex offender"*

This PSF for "sex offender" may be waived "after review and approval by the DSCC Administrator." Judges in other cases have expressly<sup>94</sup> and implicitly<sup>95</sup> suggested that the DSCC Administrator waive a PSF. We ask the Court to recommend that the PSF for "sex offender" be waived in this case.

**D. Judicial Recommendation: Accommodation under the ADA/Rehabilitation Act**

Along with the persistent abuse at the hands of other inmates and prison staff, the prison environment, including its fluorescent lighting and loud noises, presents a constant

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<sup>94</sup>This is believed to be contained in the sealed order to the Bureau of Prisons in USA v. Skilling, 04-cr-00025 (SD Texas, Lake, J) Doc. No. 1155 (Judgment "That the defendant be designated to a facility as close to FCI Butner, North Carolina, as possible. \*See attached sealed Court Order Recommending Prison Designation (October 24, 2006), for Bureau of Prisons only."); Doc. No. 1150 (Sealed Order)

<sup>95</sup>USA v. Ulbricht, 14-cr-00068 (SDNY, Forest, J), Dkt# 269 ("It is respectfully recommended that the defendant be designated to FCI Petersburg I in Virginia in the event that the Bureau of Prisons waive the public safety factor with regard to sentence length. However, if the Bureau of Prisons is not inclined to waive the public safety factor, it is respectfully recommended that the defendant be designated to USP Tuscon, in Arizona, or, as a second choice, USP Coleman II, in Florida.")

source of physical and mental pain for these individuals who are overly sensitive to the most mundane features of everyday life.<sup>96</sup>

We ask the Court to direct that the Bureau of Prisons must evaluate Michael's difficulties and make accommodations that will reduce the resulting pain and discomfort. The Rehabilitation Act of 1973 requires this.

Prisons excessively impose solitary confinement on the intellectually and developmentally disabled as a way to deal with their complaints or vulnerabilities or dysfunctional behavior, especially those with ASD. Excessive solitary confinement is not only cruel and unusual punishment, it violates international law. The U.N. Convention on Torture defines torture as any state-sanctioned act "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for punishment, intimidation, or for a reason based on discrimination.<sup>97</sup> Disregarding the needs of the disabled by treating them "like everyone else" is discrimination. We ask the Court to make it clear that isolating (and punishing) this defendant as a way to reduce environmental insults is neither the Court's intention nor lawful.

## Conclusion

Because of the way Michael's brain works, he did not understand or appreciate the strong social disapprobation and potential harm implicated in his participation in sexualize conversations with minors on the Internet in his dealing with child pornography. In a very real and scientifically measured way, in the most important area of social adaptation skills,

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<sup>96</sup>Sherak Assessment at 6 (remarking that ASD individuals are "overly sensitive and reactive to common stimuli such as sounds, smells, and textures that the more neurotypical individual might not even notice let alone react to").

<sup>97</sup>Since the 1990s, the U.N. Committee Against Torture has repeatedly condemned the use of solitary confinement in the U.S. In 2011, the U.N. special rapporteur on torture warned that solitary confinement "can amount to torture or cruel, inhuman, or degrading treatment or punishment when used as a punishment, during pre-trial detention, indefinitely or for a prolonged period, for persons with mental disabilities, or juveniles."

Michael has no more moral blameworthiness than a small child. Though inconceivable to many, this scientific fact must be kept in mind when deciding the fate of this young man who faces so many challenges already. Michael lacks the common sense and intuitive skills that would have protected him from entering these dangerous inconsequential territories. His ASD prevented him from being alert to issues of possible age differences or lack of legal ability to consent, as well as the wrongfulness of seeking underage images.

Understanding that Michael's behavior as "counterfeit deviance," the current conviction and required sentence is an enormous tragedy for this young man and his whole family. Certainly the "cap" on sentencing in the plea agreement should be accepted. But, additionally, the court should do what it can to accommodate the defendant's disability but a Bureau of prisons, and in the terms it sets for supervised release, and in the other requests made above.

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- Exhibit F Love v. USA, [2018] EWHC 172 (Admin), Approved Judgment  
[excerpt]